# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 194

# (20,504.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1907.**

# No. 184.

THE HUDSON COUNTY WATER COMPANY, PLAINTIFF IN ERROR,

*vs.*

ROBERT H. McCARTER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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1 New Jersey Court of Errors and Appeals.

Between—

ROBERT H. MCCARTER, Attorney-General, on the Relation of HENRY B. KUMMEL, State Geologist, Informant,
and
THE HUDSON COUNTY WATER COMPANY, Defendant.

On Appeal of the Hudson County Water Company.

Appeal.

In Chancery of New Jersey.

The Hudson County Water Company hereby appeals from the Final Decree, dated September nineteenth, nineteen hundred and five, and filed on that day in above-stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, September 25th, 1905.

COLLINS & CORBIN,
*Solicitors and of Counsel with The Hudson County Water Company.*

2 I conceive there is good cause for appeal in the above-stated cause.

CHARLES L. CORBIN,
*Of Counsel with Defendant.*

(Filed and Served September 26th, 1905.)

New Jersey Court of Errors and Appeals.

Between—

ROBERT H. MCCARTER, Attorney-General, on the Relation of HENRY B. KUMMEL, State Geologist, Respondent,
and
THE HUDSON COUNTY WATER COMPANY, Appellant.

On Appeal of the Hudson County Water Company.

*Petition of Appeal.*

To the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of the Hudson County Water Company, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds itself aggrieved by the final decree made in the Court of Chancery, by the Chancellor, bearing date on

the nineteenth day of September, nineteen hundred and five, and filed on that day, in this respect, that by the said decree the Chancellor directs that the Hudson County Water Company be enjoined from carrying out of the State of New Jersey any of the waters of the Passaic river, and that the said company shall pay costs to the informant on the ground that the same is erroneous, and that
3 the information of the informant should be dismissed, with costs.

Your petitioner, therefore, prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Court shall seem meet.

COLLINS & CORBIN,
*Solicitors of Appellant.*
CHARLES L. CORBIN,
*Of Counsel with Appellant.*

(Filed and Served September 26th, 1905.)

New Jersey Court of Errors and Appeals.

Between—

ROBERT H. McCARTER, Attorney-General, on the Relation of HENRY B. KUMMEL, State Geologist, Informant and Respondent,
and
HUDSON COUNTY WATER COMPANY, Defendant and Appellant.

On Appeal of the Hudson County Water Company.

*Answer to Petition of Appeal.*

The Answer of the Above-named Respondent to the Petition of Appeal of the Above-named Appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the Nineteenth day of September, A. D. Nineteen Hundred and Five, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

ROBERT H. McCARTER,
*Attorney General, Solicitor and Counsel of Respondent.*

*Amended Information.*

(Filed September 19, 1905.)

In Chancery of New Jersey.

To His Honor William J. Magie, Chancellor of the State of New Jersey:

Informing, showeth unto your Honor, your informant, Robert H. McCarter, Attorney-General of the State of New Jersey, on behalf of the State, and at and by the relation of Henry B. Kummel, State Geologist.

1. The East Jersey Water Company is a corporation of the State of New Jersey engaged in the sale of water from the Passaic river to municipal corporations and to water companies engaged in the supply of water to municipal corporations and to other consumers within the State of New Jersey. The said company has established extensive works at Little Falls, on the Passaic river, in the State of New Jersey, and has constructed a large filter plant and
4 pumping station there, and daily diverts from the Passaic river, for the purpose of such supply, a large quantity of water estimated at thirty million gallons of water or more, and the demands of their said customers in the State of New Jersey are increasing from year to year with the growth of population.

2. In the year eighteen hundred and ninety-five the East Jersey Water Company entered into a contract with the New York and New Jersey Water Company, also a corporation of the State of New Jersey, to sell to that company all the water which it might require for the supply of the city of Bayonne, in the county of Hudson, New Jersey. Under said contract the New York and New Jersey Water Company constructed a main, connecting with those of the East Jersey Water Company in Kearny township, in the county of Hudson, and extending thence into the city of Bayonne, and began the delivery of water to the municipal authorities of the city of Bayonne in the year eighteen hundred and ninety-seven, and has since continued to furnish to that city its supply of water for distribution among its inhabitants under that contract. The main thus constructed by the New York and New Jersey Water Company has a capacity of about twelve million gallons per day. Your informant begs for greater certainty to refer to said contract for greater certainty as to its exact provisions.

3. In the year nineteen hundred and four, the New York and New Jersey Water Company entered into a further contract with the city of Bayonne, whereby they were authorized and required to lay larger mains in the streets of the city of Bayonne, and to use the same to deliver water, not only to the city of Bayonne but to carry the same through the city to points beyond its territory; and said contract made in the year nineteen hundred and four, was assigned by the New York and New Jersey Water Company to the Hudson County Water Company, a corporation of the State of New Jersey

then just organized, which company thereupon entered upon
5 the laying of said mains in the streets of the city of Bayonne, and has laid mains in said streets, far beyond the capacity required to supply the said city of Bayonne and for the purpose of carrying water through the said city of Bayonne into Staten Island, in the State of New York. And your informant is informed, and believes and charges, that the New York and New Jersey Water Company has agreed with the Hudson County Water Company to supply the latter company with water out of the supply received by the New York and New Jersey Water Company from Little Falls, for the supply of consumers in Staten Island.

4. Your informant is also informed, and believes and charges, that the Hudson County Water Company has entered into a contract with the Staten Island Rapid Transit Railway Company, the Staten Island Railway Company and the Baltimore and New York Railway Company, to supply to them in Staten Island the water needed by them for use therein on their railroads from the aforesaid source of supply, and that the said water company also made, about the same time, sundry contracts with other consumers in Staten Island for the delivery of water to them in Staten Island from the same source, and your informant prays leave to refer to such contracts for greater certainty as to their exact terms.

5. On the first day of June, nineteen hundred and five, or at some time subsequent to the approval of the act of the Legislature of the State of New Jersey hereinafter referred to, and with full knowledge of its provisions, the Hudson County Water Company entered into a contract with the city of New York for the supply of water, from the same source, into Staten Island, to be distributed by the municipal authorities of the city of New York to consumers in Staten Island, and the said city of New York agreed with the Hudson County Water Company, by said contract, to accept and pay for not less than three million gallons per day of water, beginning within one
6 year, and extending for a term of ten years, from the date of first delivery, but your informant begs leave to produce the said contract for greater certainty as to its terms.

6. Your informant shows that the Passaic river is the principal and most important of the available sources of supply of water to the cities and towns of New Jersey; and that the area of the water-shed, above Little Falls, of the Passaic river and its tributaries, is seven hundred and seventy-three square miles, all of which area is in the State of New Jersey, except one hundred and forty-eight and six-tenths square miles, being a part of the water-shed of the tributaries of the Passaic river which lie in the State of New York. The total supply available from the total water-shed of the Passaic river and its tributaries at and above Little Falls is estimated by the State Geological Survey, Report of 1894 (p. 159), without storage, at 84,661,632 gallons per day, and, if fully improved by storage, at five hundred and fifteen million gallons per day. On one of the tributaries of the Passaic river, namely the Pequannock, there has been improved an area of sixty-four square miles with reservoirs and dams, providing an available supply of fifty million gallons per day and

upwards, from which at the present time the city of Newark takes an average of upwards of thirty million gallons per day. The demand of said city of Newark is likely to exceed, within the next forty years, the whole available supply from the said works on the Pequannock, and it will become necessary for the said city to appropriate for its use other portions of the said water-shed. For Jersey City there has been impounded on the Rockaway river, by means of a great reservoir at Old Boonton, an area of one hundred and eighteen square miles of said river, being one of the tributaries of the Passaic river, from which source of supply said city is now drawing about thirty-two million gallons per day, and the water thus impounded is available for a supply of seventy million gallons per day,
7 and in the future the demand of Jersey City is likely to rise beyond the full capacity of said supply.

From the above mentioned works of the East Jersey Water Company, at Little Falls, is taken the supply of the cities of Paterson and Passaic and other towns, exceeding thirty million gallons per day; which supply is likely to greatly increase with the growth of population. The demand for water for use in the State of New Jersey is growing even more rapidly than the population of the State, and it is apparent that within a short time the entire supply of the Passaic river and its tributaries will be required for the uses of the people of the State of New Jersey. That the Passaic river is a natural outlet for the drainage that exists within its valley, and receives such drainage, including much fetid and unhealthy matter, and carries it to the sea, and that the maintainance of the normal quantity of water within its banks is necessary to prevent its further pollution; several municipalities bordering near or upon the said river, by legislative authority or otherwise, are and for a number of years past have been, emptying their sewage into said river, and already the waters of said river have become greatly contaminated, and the health, comfort and prosperity of the good citizens of the State of New Jersey living near or along the banks of said river have become affected thereby and are in danger of becoming more so, and that any further diversion of the waters of said Passaic river, at Little Falls or elsewhere, for the purpose of transmission to the State of New York, will render the stream inadequate to carry such sewage, fetid matter or drainage into the sea, and will cause discomfort and disease to the inhabitants of the State of New Jersey who live or work near to or adjoining said stream below the point of diversion. And your informant shows that the diversion of large quantities of water from the Passaic river at Little Falls will render the stream inadequate to perform the functions designed by nature, which functions are essential to the
8 health and prosperity of the citizens of this State, and will deprive the State and its citizens of large quantities of water which belong to the State by virtue of its sovereignty as successor to the English Crown in the ownership at common law of all the waters of fresh water streams, subject to the rights only of the riparian owners along said streams, and which, if undiverted in the manner proposed, would ultimately flow on to lands of, and become the prop-

erty of the State; and your informant shows that such diversion is in violation of the statutes of this State.

Your informant, therefore, prays that the Hudson County Water Company, pursuant to the provisions of the act, entitled "An Act to preserve and maintain the lakes, ponds, brooks, creeks, rivers and streams of this State, and to prevent the water thereof from being carried by pipes, conduits, ditches or canals, into other States for use therein, and to authorize the Court of Chancery to assist in the observance of this act," approved May 11th, 1905, and otherwise may be enjoined from carrying or transporting any of the waters of the Passaic River into Staten Island or elsewhere out of the State of New Jersey, and that your informant may have such other and further relief as may be agreeable to equity; and that said last-named company may, without oath, answer the premises.

May it please your Honor, the premises considered, to grant unto the Attorney General, upon the relation aforesaid, not only the State's Writ of Injunction, issuing out of and under the seal of this court, to be directed to the Hudson County Water Company, its servants, agents and workmen, restraining and enjoining them, and each of them, from carrying or transporting into the State of New York the waters of the Passaic River, but also the State's Writ of Subpœna, to be addressed to the said Hudson Water Company, commanding it on a certain day and under a certain penalty, therein to be expressed,
to be and appear before your Honor, in this honorable court,
9 then and there to answer, all and singular, the premises, and
to stand to, abide and perform such order and decree as to your Honor shall seem meet.

ROBERT H. McCARTER,
*Attorney-General of the State of New Jersey.*

In Chancery of New Jersey.

Between—

ROBERT H. McCARTER, Attorney-General, on the Relation, &c.,
Informant,
and
HUDSON COUNTY WATER COMPANY, Defendant.

On Information.

*Order to Show Cause and Restraining Order.*

(Filed June 28, 1905.)

This matter being opened to the Court by Robert H. McCarter, Attorney-General, and the Court having read the Information and the Answer of the Hudson County Water Company filed thereto.

It is thereupon on this 28th day of June, 1905, on motion of the Attorney-General, ordered that the defendant, Hudson County Water Company, show cause before the Court at the State House, in the city

of Trenton, on Tuesday, the 1st day of August, 1905, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue as prayed for in said Information.

And it is further ordered that in the meantime and until the further order of the Court, said Hudson County Water Company
10 do desist and refrain from carrying or transporting by pipes, conduits, ditches or canals any of the waters of the Passaic River into Staten Island, or elsewhere, out of the State of New Jersey.

And it is further ordered that a copy of this order, which need not be certified, be served within five days from the date hereof upon the solicitors of the said defendant.

W. J. MAGIE, *C.*

Respectfully advised,
J. J. BERGEN, *V. C.*

In Chancery of New Jersey.

Between—

ROBERT H. MCCARTER, Attorney-General, on the Relation of HENRY B. KUMMEL, State Geologist, Informant,
and
HUDSON COUNTY WATER COMPANY, Defendant.

On Bill, &c.

*Answer.*

The Answer of the Hudson County Water Company, defendant, to the Bill and Information of Robert H. McCarter, Attorney-General:

This defendant admits that the East Jersey Water Company is engaged in the sale of water, at wholesale, from the Passaic River, to water companies and to municipal corporations, and that said company has established extensive works at Little Falls, on the Passaic River, and diverts water therefrom to the amount of thirty millions of gallons or more, for the supply of several municipal corporations, and other consumers, whose demands are
11 increasing from year to year with the growth of population.

This defendant also admits that a contract was made in the year 1895 by the East Jersey Water Company with the New York and New Jersey Water Company, to sell to the latter company all the water which that company required for the supply of the city of Bayonne, and says that the said contract also contained provisions for the supply, at the same rate, of all the water which the New York and New Jersey Water Company might require for delivery to consumers in Staten Island, in the State of New York, and admits that under said contract the New York and New Jersey Water Company constructed a main, connecting with the mains of the East Jersey Water Company in the town of Kearny, in the county of Hudson,

and extending to the territory of the city of Bayonne, in said county, and that the New York and New Jersey Water Company thereupon began the delivery of water, drawn from the Passaic River, under its contract, to the city of Bayonne, in the year 1897, and has since continued to furnish such water to that city, for distribution among its inhabitants, the supply amounting to about three million gallons per day.

And this defendant admits that the capacity of the said main constructed by the New York and New Jersey Water Company is about twelve million gallons per day, and says that the main was constructed with a capacity largely in excess of the needs of the city of Bayonne in order that water might be transported through said main for the supply of consumers in Staten Island, in the State of New York.

This defendant admits that in the year 1904 the New York and New Jersey Water Company entered into a further contract with the city of Bayonne, whereby the said water company and its assigns were authorized and empowered to lay additional mains in the streets of the city of Bayonne, and to use the same to deliver water not only to consumers in the city of Bayonne, but to consumers outside of its territory, and to extend the mains to
12 points beyond the territory of the city, and said contract was, in the year 1904, assigned by the New York and New Jersey Water Company to the Hudson County Water Company, also a corporation of New Jersey, which company thereupon, in the same year, entered upon the laying of said mains in the streets of the city of Bayonne, and has laid such mains far in excess of the capacity required to supply the city of Bayonne, and has so laid such mains for the purpose of carrying water through the city of Bayonne to Staten Island, in the State of New York, and has agreed with the New York and New Jersey Water Company to take from them water for said supply, which the New York and New Jersey Water Company agrees to deliver out of the supply drawn from the Passaic River at Little Falls, which water the Hudson County Water Company proposes to deliver to consumers in Staten Island, through pipes and conduits.

This defendant admits that it entered into contracts with the Staten Island Rapid Transit Railway Company, the Staten Island Railway Company, and the Baltimore and New York Railway Company, to supply to them, in Staten Island, through pipes and mains, the water needed by them for use on their railroads, from the said Passaic supply, and says that said contracts were made in December, 1904, and this defendant admits that it also made contracts with other consumers in Staten Island, about the same time, for the delivery of water to them in Staten Island, from the same source.

This defendant admits that on the 1st day of June, 1905, it entered into a contract with the city of New York to deliver water, to be taken from the Bayonne mains of the company, into Staten Island, to be distributed there by the municipal authorities of the city of New York to consumers in Staten Island, and that the said

city agreed with this defendant, by said contract, to accept and pay for not less than three million gallons per day, beginning within one year, and continuing for a term of ten years from the date of the first delivery.

13 This defendant admits that the Passaic River is the most important of the available sources of supply of water to the cities and towns in New Jersey; that the area of the water shed, above Little Falls, of the Passaic River and its tributaries, is seven hundred and seventy-three (773) square miles, and that all of this area lies in the State of New Jersey, except one hundred and forty-eight and six-tenths (148.6) square miles, which lies in the State of New York. That on one of the tributaries, namely Pequannock, there has been improved, by storage, sixty-four (64) square miles, which provides an available supply of fifty million gallons per day for the city of Newark, from which the city now takes upwards of thirty million gallons per day; that on another tributary, the Rockaway River, there has been impounded an area of one hundred and eighteen (118) square miles, by means of a great reservoir at old Boonton, from which source Jersey City now draws about thirty-two million gallons per day, and that the water thus impounded on the Rockaway is available for a supply of seventy million gallons per day; that from the works of the East Jersey Water Company at Little Falls there is taken the supply of the cities of Paterson and Passaic, and other towns, exceeding thirty million gallons per day; that these demands are likely to increase with the growth of population, and that the total supply available from the Passaic River and its tributaries above Little Falls—if fully developed by storage—would be five hundred and fifteen million gallons, as stated in the bill.

This defendant, further answering, says:

That at the present time the supply available from the Passaic River from the existing works, for municipal and domestic uses, is largely in excess of the present requirements of the New Jersey consumers of Passaic Water; that this defendant entered into contracts, as above set forth, and constructed its water works and laid mains for the purpose of delivering water to consumers in Staten Island, in the State of New York, to be obtained, under its

14 contracts from the Passaic River, and that it had incurred heavy expense and made large disbursements for the purpose of carrying out said contracts, before the passage and approval of the act approved May 11th, 1905, and this defendant is advised and pleads that if said act is applicable to this defendant, and to its delivery of water under said contracts, it is void, because it impairs the obligation of said contracts, which were in force at the time of the passage of said act and had been lawfully made; because it takes property without due compensation and without due process of law; because it provides for an interference with commerce between the State of New Jersey and the State of New York; because it denies to citizens and inhabitants of other States, the privileges of citizens of New Jersey, and abridges the privileges of citizens of other States

and denies to them the equal protection of the laws of New Jersey; and because it is in violation of the provisions of the Constitution of the United States, and of the Constitution of the State of New Jersey.

All which matters this defendant is ready to maintain and prove, and prays to be hence dismissed with costs.

THE HUDSON COUNTY WATER COMPANY,

[L. S.] By T. A. BEALL, *President.*

Attest:

CLARENCE F. WALKER, *Secretary.*

STATE OF NEW JERSEY, *ss:*

The answer of the defendant, the Hudson County Water Company, was taken this 28th day of June, in the year nineteen hundred and five, before me, under the common seal of said corporation as by their said seal thereto affixed appears.

JAMES J. MURPHY,
*Master in Chancery.*

COLLINS & CORBIN,
*Solicitors and Counsel of Defendant.*

(Answer filed July 3d, 1905.)

15 *Evidence Admitted on the Hearing.*

EXHIBIT A.

*Ordinance and Acceptance.*

To the Honorable the Mayor and Council of the City of Bayonne, New Jersey:

GENTLEMEN: At a meeting of the Board of Directors of the New York and New Jersey Water Company, held this day, the following preamble and resolutions were unanimously adopted:

Whereas, There has been submitted to this Board an Ordinance passed by the Council of the city of Bayonne on June 21st, 1904, and approved by his Honor, the Mayor of Bayonne, June 24th, 1904, which ordinance is in the words and figures following:

*An Ordinance.*

An Ordinance to provide for an extension of the system of water mains in this City, and for a further supply of water for the purpose of extinguishing fires and for other purposes in this City.

Whereas, The water supply of this city is received from The New York and New Jersey Water Company (assignee of William de H. Washington and Turner A. Beall), under and by virtue of the

provisions of a certain contract bearing date September 6th, 1894, made by and between the City of Bayonne and the said William de H. Washington and Turner A. Beall, the intake of said water supply being at the northerly extremity of the city, from which intake the water is distributed throughout the City by mains owned by the City, which distributing mains have by reason of their age
16 become incrusted, and their capacity lessened, which, with the greatly increased demands of the manufacturing industries located here, as well as the large increase of population, have rendered the said distribution system inadequate for the present needs of the City; and

Whereas, Notwithstanding the provision which is now being made by the laying of an additional main to increase the supply for a portion of the City, it is deemed advisable, in view of the rapid increase in population and the incoming of additional manufacturing industries, to make further provision for an increased pressure and quantity, and for better protection against fire for the entire City, as well as to secure the means of procuring an adequate water supply for the future; and

Whereas, This City can make provision for securing such additional pressure, quantity and fire protection only by the laying of additional water mains at large expense; and

Whereas, The New York and New Jersey Water Company at its own cost and expense, and without the expenditure of any money by the City, has offered to lay water mains in and through certain of the streets and avenues of this City, hereinafter designated, for the purpose of conveying water to and throughout the City, as well as beyond the City, on the terms hereinafter provided, by means of which mains such better provisions will be made for the present and future water needs of the City, and the said company has also offered to erect and maintain at its own cost and expense a certain number of fire hydrants along the line of the said mains so to be laid by it, and also at its own cost and expense to furnish from said mains and hydrants water free, which may be drawn therefrom for the purpose of extinguishing fires and for street sprinkling purposes; and the said company offers also to pay to the City a sum equal to five dollars ($5.00) per million gallons for each and every million gallons of water that may be conveyed by said mains beyond the City; and

17 Whereas, It is the judgment of this board that it is to the advantage of this City that such offer should be accepted; therefore

Be it ordained by the Mayor and Council of the City of Bayonne as follows:

SECTION 1. That the offer of the New York and New Jersey Water Company, above recited, be accepted, and the right is hereby granted to the said The New York and New Jersey Water Company, its successors and assigns, upon the conditions herein stated, to lay, maintain, repair, renew and operate water mains, not exceeding two, which mains may be constructed of either steel or iron pipes of an internal diameter not less than sixteen (16) inches each, and not

more than thirty-six (36) inches each for a period of twenty-five years from the date hereof (and not to be made any longer by any power, except by consent of the City), from a point in West Fifty-fifth street, near and west of the Avenue "D," to be designated by the Mayor; thence easterly to Avenue "D"; thence southerly through Avenue "D" to East Fifty-second Street; thence easterly through East Fifty-esecond Street to Avenue "E"; thence southerly through Avenue "E" to Linnet Street; thence easterly through Linnet Street to Ingham Avenue; thence southerly through Ingham Avenue and under the property of the City at the foot of said Ingham Avenue to and continuing under the waters of the Kill von Kull to the southerly boundary line of this City, said mains to be constructed and maintained not less than three and one-half feet (3½ ft.) below the surface of the street, which mains may be laid at the same time, or at different times, at the option of the said water company and as hereinafter provided, the first main laid to have its centre line six feet (6 ft.) west of the centre line of Avenues "D" and "E," six feet (6 ft.) south of the centre lines of East Fifty-second Street and Linnet Street, and ten feet (10 ft.) east of the center line of Ingham Avenue, together with all the necessary gates, gate boxes,
18 valves, manholes, vaults, meters, meter-booths, and other usual and necessary appliances for the safe maintenance and operation of the said water main or mains; the second main to be laid on the westerly and southerly sides of the first main, two feet (2 ft.) distant therefrom in the clear; in no event shall more than five hundred feet of any street or avenue be opened or excavated at any one time, and in no case shall any cross street or avenue be blocked so as to obstruct the passage of vehicles during the progress of work in laying such pipes or water mains, and that such excavations and work shall be so made and done as not to interfere with the way or approach of fire engine or other fire apparatus to any of the fire hydrants on the line of such work, and if such company should in doing such work, obstruct any cross street or avenue, or obstruct the way to any fire hydrant, the city officers shall have the right to remove such obstruction at the cost and expense of said company, which shall be liable to and shall pay the City the cost therefor; such work shall be so done as not unnecessarily to interfere with, and shall not injure any other construction or work in or under any of the streets or avenues; and the said water company shall at its own cost and expense immediately after laying and testing said mains fill up all excavations and relay all pavements or sidewalks which may be removed or in any way disturbed during the progress of such work, and it shall leave the streets and avenues and maintain the same for at least six months in as good condition after such main or mains have been laid as said streets and avenues were in before the commencement of such work; the grade of said main or mains, their distance from each other and from other structures, at different points, and all the rest of the said work to be subject to the direction of the Mayor of this City, or the Council or its Committee on Water and Streets, or other proper designated officer or Committee of the

City of Bayonne; the first main above mentioned to be laid
19 and completed within one year of the date of this ordinance, except that any delay caused by injunction or other judicial process, or unavoidable accident, or delay in getting any necessary land or right of way, or malicious interference, or strikes, shall not be counted part of the one year above limited, but to the extent of not exceeding one year's additional time, delay so caused may be added thereto. The City may at any time or times make lay and construct, or have made, laid and constructed in and under any or all of said streets or avenues, sewers, drains, culverts, gas pipes, water pipes and electric wires and other wires, as well as from time to time to extend, relay, reconstruct, repair and maintain the same, and to make and maintain or have made and maintained any and all municipal or quasi-municipal works and public improvements and excavations therefor, whether specified hereunder or not, in and under all said streets and avenues, and either parallel to or across the said main or mains and over or under the same as the case may be, and as in the opinion of the appropriate City officer or Board may be necessary and proper; and the water company shall, on receipt of reasonable notice from the City, take the necessary steps to protect such main or mains from any injury arising from necessary and unavoidable work incident to the construction of any municipal improvement, and to raise or lower said main or mains, if necessary, at any sewer crossing, and shall not claim damages from the City therefor; but nothing herein shall be construed as preventing the water company from requiring from any contractor, or any person or corporation other than the City, compensation for indemnity against injury or damage to its main or mains; and in case said water company does not raise or lower said main or mains where necessary at any sewer crossing, within twenty days of notice by the City, then the City may do the same or have the same done at the expense of said water company.

When the water company shall determine to lay the second
20 line above referred to, it shall serve two months' notice thereof upon the Mayor of the city and upon its Council or the City Clerk, and said second main shall be laid in the sereets and avenues and according to the specifications hereinbefore designated, unless the City shall determine to have it laid in other streets and avenues for the better and more efficient distribution of the supply of water throughout the City; in which event the City shall designate such other streets and avenues to be used for such purpose, and the water company shall then lay such second main in such other, and only in such other, streets and avenues, provided said company shall not pay the cost for the second route to any extent that it may exceed by more than one thousand feet (1,000 feet) the length of the first line laid hereunder, the cost of such excess length of line over one thousand feet longer than the first line to be paid by the City, and both said mains to converge at the foot of Ingham avenue. On or before the laying of the said second line in and through the City of Bayonne, the company shall lay or cause to be laid, from the company's point of intake to the City's point of intake, of its supply

of water, a second supply main or conduit of as large a capacity and as good a quality and durability as said second main to be laid in the streets of the City, its said supply main or conduit to be laid to and connect with its said two mains and with the City's distributing mains at the northerly end of the City of Bayonne, at a point or points to be designated by the Mayor of the City or by the Mayor and Council.

SECTION 2. The grant made herein is upon the further condition that the said water company, its successors and assigns, shall erect, when said mains are being laid, and shall maintain throughout the time of this grant, at points to be designated by the City, twenty (20) fire hydrants along the line of each of the said two mains, or forty hydrants in all, which hydrants shall be of standard pattern, with double openings and suitable for use by the fire depart-
21 ment of the City of Bayonne, and shall be kept in good repair, and be maintained by the said water company, its successors and assigns, who or which shall also furnish to the City free water from said hydrants for the extinguishment of fires, and for reasonable use in sprinkling streets throughout the time of this grant.

SECTION 3. The City shall from time during and after the construction of said main or mains designate points at street crossings at which said main or mains shall be tapped and water drawn therefrom into the distributing pipes of the City for the purpose of supplying water to the manufacturers and other customers of the City, and for all other needs of the City, for a full, complete and efficient water supply; all such taps and all valves thereto to be made and set by the water company at its own cost and expense, if the places therefor be designated by the Mayor or by the Mayor and Council while said main or mains are being laid, but at the expense of the City if such places or points be not designated by the City during the construction of said main or mains, and to be operated jointly by said water company and by the City. The City shall at its own expense set and maintain a meter at each of the said taps or connections, to which the representatives of the City and said company shall have access at all reasonable times, by which the amount of water so drawn from the said main or mains and delivered into the distributing pipes of the City shall be measured, and the amount thereof shall be charged to the City; and it shall be accepted and paid for by the City at the same rates and upon the same terms as to the payment to the said water company, its successors or assigns, or its or their trustee, as is provided for by the said contract of September 6, 1894; or.

The City may, at its option, either before or after setting any or all such meters at said taps and connections, elect to have a differ-
ent method of measuring and arriving at the amount of water
22 to be drawn from said main or mains, and delivered into the distributing pipes of the City, namely, by means of a standard meter or meters to be provided, set and maintained by said water company at the point or points of intake of water at or near the northerly line of the City, and also at the point of outlet of water

at the foot of Ingham Avenue, near the southerly line of the City—the difference between the quantity of water received at said intake point or points and that passing out at said outlet point to be the amount of water to be charged to the City as aforesaid (less the amount of water passing through the twenty hydrants on each of said mains as aforesaid, for fire purposes or for street sprinkling, which shall be supplied free to the City, and may at the option of the city be metered at each hydrant, or the value of which hydrant water shall be estimated at $30.00 per hydrant per annum, which amount the water company shall in that event allow the City as a rebate on its water bill.

SECTION 4. This grant is on the further condition that the water company shall not sell water either in or out of the City, for consumption within the City, or for resale within the City, except to the City, and said mains shall never be used for any other purpose than as water mains. The water company may convey water by means of the main or mains hereinbefore referred to (subject to the prior fulfillment of all its obligations to deliver water to the City, as to quality, quantity and pressure and in all other respects, under the contract of September 6th, 1894, and under and pursuant to the terms of this ordinance); through and beyond the limits of the City of Bayonne, if legally authorized so to do, and all water so conveyed shall be metered by a standard meter or meters at the southerly end of the main or mains hereinafter referred to; and the said company shall, as a condition of and in consideration of this grant, pay to the City quarterly a sum at the rate of and equal to $5.00 per million gallons for each and every million gallons of water so conveyed beyond the limits of the City, as shown by the said meter or
23 meters at the southerly end of said main or mains, and the City shall be entitled to receive said sum, at its option, in cash, or by a credit upon its bills from the water company for water delivered to it by said company through either or both of said two mains, or through the existing supply main bringing water to the City, and in that event to that extent the contract price of said company's water supplied to the City shall be reduced; and the City's officers shall have access at all reasonable times to inspect and examine said meter or meters and every other meter that may be used to measure any water furnished to the City or to measure water in whose quantity the City may be interested, and shall have the right to require that every such meter or meters shall be repaired from time to time whenever necessary, at the expense and cost of the water company; and the water company shall have the same right in regard to any meter or meters of the City and used to measure water in which the company is similarly interested.

SECTION 5. In case it shall be found that any power or rights possessed, or that may be acquired by the City in respect to the prevention of the pollution of any water, or the prevention of injury to any portion of the works now constructed or the additional works proposed to be constructed for the supply of water for the City; or the punishment for such injury, or the condemnation of

lands, water or rights, may be advantageously used or exercised for the purpose of more effectually carrying out this ordinance, the City agrees so far as it has or may acquire the power so to do, to put such powers or rights in force, or to authorize the water company, its successors or assigns, so to do in the name of the City, but in every such case, or in any case at the expense of the water company, its successors or assigns.

SECTION 6. Nothing herein shall impair any right, option or interest of the City, under the said contract of September 6th,
24 1894; but every such right, option and interest are hereby expressly saved and reserved to and for the City, and nothing herein shall be construed to extend the time of said contract of September 6th, 1894, to any period beyond that specified therein, namely: twenty-five years of and from its said date.

SECTION 7. The rights and duties hereunder shall enure to and bind said water company, its successors and assigns; and whenever said company refuses or neglects to do any work herein required of it, the City may do the same or have the same done at the company's expense, and the company shall owe and pay the city the reasonable cost of doing the same, as a debt due from the said company to the City.

SECTION 8. This ordinance shall take effect when, and not until, it is accepted in all its terms by said The New York and New Jersey Water Company, by an instrument in writing, duly executed by it under its corporate seal, and filed in the office of the City Clerk of this City, whereby said water company will agree to comply with all the conditions hereof, and to fulfill all the provisions hereof on its part, when this ordinance and its acceptance as aforesaid shall constitute a contract between said water company and the City for a period of twenty-five years (and no longer, as aforesaid) provided said contract in writing be so executed and filed within ten days from the date of the passage and the adoption of this ordinance.

Passed June 21, 1904.

Approved June 24, 1904.

THOMAS BRADY, *Mayor.*

Attest:

W. C. HAMILTON,
*City Clerk.*

*Now therefore be it Resolved,* That this Company hereby accept in all its terms the foregoing Ordinance, and hereby agrees
25 to comply with all the conditions thereof, and to fulfill all the provisions thereof, on its part, and agrees that the said Ordinance, and this acceptance thereof, shall constitute a contract between this Company and the City as in said Ordinance provided;

*Resolved,* That the President and Secretary of this Company be, and they are hereby authorized and directed to file a copy of this resolution of acceptance, duly executed by the Company under its corporate seal, in the office of the City Clerk of the City of Bayonne,

within ten days from the date of the passage and the adoption of the said Ordinance.

Dated, New York, June 28th, 1904.

THE NEW YORK AND NEW JERSEY WATER COMPANY,

(Signed) T. A. BEALL, *President.*

Attest:

(Signed) JOSEPH H. BEALL, *Secretary.*

EXHIBIT B.

*Memorandum of agreement* made and entered into this 16th day of May, 1903, by and between The New York and New Jersey Water Company, a corporation of the State of New Jersey, party of the first part, and the Richmond Water Company, a corporation organized and existing under the laws of the same State, party of the second part:

Whereas the party of the first part is in control of an ample supply of pure and wholesome water which it receives by contract from the East Jersey Water Company and which flows through its mains to a point in Bayonne at 55th Street and Avenue D, and in quantity greatly in excess of the amount at present required or likely
26 to be required in the near future for the purpose of its present contracts; and the said party of the first part, by reason of its existing contracts and outstanding bond issues, is not in a position to finance extensions of its mains for the purpose of supplying water to Staten Island; and

Whereas the party of the second part has secured or is about to secure certain contracts for furnishing a water supply to consumers, manufacturers and others on Staten Island, among such consumers being the Staten Island Rapid Transit Railway Company, the Staten Island Railway Company and the Baltimore & New York Railway Company, together with rights of way for the laying of mains along the line of said Railroads; and also contracts for the supplying of water consumed by the National Lead Company, the Burlee Dry Dock Company, J. B. King & Co., and others; and the said party of the second part is desirous of securing a supply of water for the purpose of fulfilling such contracts.

*Now this agreement witnesseth:*

I. The party of the first part agrees to sell to the party of the second part, and deliver to it through meter at Avenue D and 55th Street, Bayonne, N. J., or at such other point as may be hereafter mutually agreed upon, all the water required by the said party of the second part for delivery under contracts now held by it or to be by it hereafter acquired for the delivery of water in Staten Island, and elsewhere. Said water to be delivered at one hundred pounds pressure at the point of delivery aforesaid. The water to be of good, pure and wholesome quality, such as now furnished by The New York and New Jersey Water Company.

II. And the said party of the second part agrees to use its best endeavors in the procuring of additional contracts for the supplying of water in Staten Island, and to build, maintain and operate such extensions, mains and water systems as may be necessary to enable it to transport the said water to Staten Island, and elsewhere, and market the same.

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III. And the said party of the second part further agrees to accept delivery from the party of the first part of said water at the point of delivery above named, and to pay for the same in quantity as shown by the said meter, out of the first proceeds of all water delivered to it and sold by it on Staten Island, at the following rate per million gallons, viz:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For the | 1st | million | gallons | delivered | per | day | ..... | | $31.15 |
| " | " | 2nd | " | " | " | " | " | ..... | 31.15 |
| " | " | 3rd | " | " | " | " | " | ..... | 28.00 |
| " | " | 4th | " | " | " | " | " | ..... | 24.50 |
| " | " | 5th | " | " | " | " | " | ..... | 19.25 |
| " | " | 6th | " | " | " | " | " | ..... | |

and for each one million gallons thereafter delivered per day 14.00

And in addition to the above amount, to pay to the party of the first part one-half of the net proceeds from the sale of such water so sold on Staten Island, after deducting interest at legal rate and any necessary sinking fund, not exceeding 1½% per annum, after three years, on Bonds to be issued by said party of the second part for the construction, equipment and development of its said water system and the actual cost, operation and maintenance of said system, including taxes and repairs thereon, clerk hire and superintendence, but no executive salaries.

IV. And the said party of the second part further agrees that it will pay to the party of the first part, out of the first proceeds of all water delivered to and sold by it, elsewhere than in Staten Island, at the following rates: The sum of $30 per million gal-ons, and in addition thereto one-half of the sum per million gallons at which said water is billed to the consumer in excess of $30 per million.

V. This contract is to continue for a period of twenty-five years from the date thereof, with privilege to the party of

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the second part of successive renewals for a like period thereafter.

In witness whereof the parties hereto have caused these presents to be signed by their duly authorized officers, and their corporate seals to be hereunto affixed, all by order of their respective boards of directors, the day and year first above written.

THE NEW YORK AND NEW JERSEY WATER COMPANY,
By T. A. BEALL, *President.*

Attest:
J. H. BEALL, *Sec'y.*

RICHMOND WATER COMPANY,
SAMUEL S. MOORE, *President.*

Attest:
CLARENCE F. WALKER, *Secretary.*

*Indenture of assignment,* made this 30th day of November, 1904, by and between the New York and New Jersey Water Company, a corporation of the State of New Jersey, party of the first part, and the Richmond Water Company, a corporation of the same State, party of the second part:

Whereas, on the 21st day of June, 1904, an ordinance was passed by the City of Bayonne, a municipal corporation of the State of New Jersey, approved by the Mayor of said City on June 24th, 1904, a copy of which said ordinance is hereunto annexed, and said ordinance was accepted by the New York and New Jersey Water Company on June 28th, 1904, and constitutes a contract between the said New York and New Jersey Water Company and the said City:

*Now this indenture witnesseth:*

I. That the party of the first part, in consideration of one dollar and other valuable consideration paid by the party of the second part, receipt whereof is hereby acknowledged, has assigned, transferred, conveyed and set over unto the party of the second part, its successors and assigns all the rights, privileges and franchises in said ordinance, contained and granted to lay, maintain and operate two water mains, in accordance with the terms and conditions of said ordinance, as fully as the party of the first part might or could do.

II. The party of the second part covenants and agrees that it will proceed forthwith to the construction of the first of said mains and will prosecute said work with diligence, and that when the second of said mains becomes necessary it will construct the same, and will maintain and operate the said mains for and during the whole of the term of said ordinance, and in such construction, maintenance and operation will observe all the requirements and conditions of said ordinance, and will indemnify and hold harmless the said City of Bayonne as therein provided and set forth.

III. It is covenanted and agreed between the parties hereto that the party of the first part shall have the right to use said mains for the transportation of water to fulfill in every respect its contract obligations with the City of Bayonne under said ordinance. The cost of any taps or hydrants for such purpose to be defrayed by the party of the first part, and such taps and all work in connection with such delivery of water to the City of Bayonne, to be made and done under the supervision and subject to the control of the duly appointed representative of the party of the second part.

IV. The party of the first part agrees to pay to the party of the second part for the use of said main or mains, the sum of $5.00 for each million gallons of water delivered to the City of Bayonne, as shown by meter measurements, settlements to be made quarterly.

V. The contract between the parties hereto, dated the 16th day of May 1903 having provided for the sale of water to the party of the second part by the party of the first part, delivery thereof to be made at Avenue D. and 55th Street, Bayonne, New Jersey, the same is hereby amended to provide that the water sold by the party of the first part to the party of the second part for delivery in Staten Island shall be measured through meter placed at

the foot of Ingham Avenue in the said City of Bayonne; and in the event of the laying of an additional main through the City of Bayonne under the terms of said ordinance, then through a meter at the foot of said Ingham Avenue and at the foot of such other street as the route of the said second main may traverse under the provisions of said ordinance.

VI. Said contract of May 16th, 1903 is hereby ratified and confirmed in all its provisions, except as herein specifically amended.

*In testimony whereof*, the parties to these presents have caused their respective common seals to be hereunto affixed, and to be signed and delivered by their appropriate executive officers, the day and year first above written.

NEW YORK AND NEW JERSEY WATER COMPANY,
[SEAL.] T. A. BEALL, *President.*

Attest:
JOSEPH H. BEALL, *Secretary.*

RICHMOND WATER COMPANY,
SAMUEL S. MOORE, *President.*

Attest:
[SEAL.] CLARENCE F. WALKER, *Secretary.*

EXHIBIT "C."

*Certificate of Change of Name.*

The Richmond Water Company, a corporation of New Jersey, does hereby certify, that it has changed its name to Hudson County Water Company, such change having been declared by resolution of the Board of Directors to be advisable, and having been duly
31 and regularly assented to by vote of all the stockholders of said Company at a meeting duly called for that purpose; and the written assent of said stockholders is hereto appended.

The location of the registered office of said Company is No. 243 Washington Street, Jersey City, New Jersey, and William H. Corbin is the agent upon whom process against the corporation may be served.

In witness whereof, said corporation has caused this certificate to be signed by its President and Secretary, and its corporate seal to be hereto affixed, the 12th day of December, 1904.

RICHMOND WATER COMPANY,
SAMUEL S. MOORE, *President.*

CLARENCE F. WALKER, *Secretary.*
[CORPORATE SEAL.]

(Annexed is the affidavit of the Secretary proving the seal, and the assent of all the stockholders, duly verified.)

Filed and recorded December 16th, 1904.

S. D. DICKINSON,
*Secretary of State.*

## Exhibit D.

*Contract, East Jersey Water Co. with N. Y. and N. J. Water Co., July 12th, 1895.*

*This agreement,* made this twelfth day of July, eighteen hundred and ninety-five, between East Jersey Water Company, a corporation duly organized under the laws of the State of New Jersey, party of the first part, and the New York & New Jersey Water Company, a corporation duly organized under the laws of the State of
32 New Jersey, party of the second part, witnesseth:

Whereas, the party of the second part is the owner of a certain contract, bearing date September 6th, 1894, between William D'H. Washington and Turner A. Beall, and the Mayor and Council of the City of Bayonne, New Jersey, (a copy of which is hereto annexed), and to carry out the provisions of said contract desires to obtain from the party of the first part a supply of pure and wholesome water; and

Whereas, The party of the first part is the owner of numerous sources of water supply, and is willing and desirous to sell water deliverable from the same;

*Now therefore,* the parties hereto in consideration of one dollar to each in hand paid by the other, the receipt of which is hereby acknowledged, and of the mutual covenants and agreements herein obtained, do mutually agree as follows:

*First.* The party of the first part undertakes and agrees to furnish, or cause to be furnished, to the party of the second part, and to begin delivery within six months from the date hereof, an ample supply of pure and wholesome water, to be delivered from available water sources into the pipe or pipes to be hereafter constructed by the party of the second part, at the corner of Belleville Avenue and Kearny Avenue, in the Township of Kearny, County of Hudson, and State of New Jersey, at such a pressure, and of such quality, and in such quantity, as will fulfill the conditions of the said contract with the City of Bayonne, and the further requirements of the party of the second part, as hereinafter provided.

Time lost by strikes or by legal proceedings or by other unavoidable accident or by the Act of God or the public enemy shall be added to the above limit of six months for the beginning of the delivery of water.

*Second.* It is agreed that in case of the forfeiture of said contract with the City of Bayonne or the cancellation thereof by said
33 City, or the release of said City from liability thereunder for any cause, the party of the first part shall not be liable for any damages, for loss of revenue or other loss to the party of the second part or to any one. It is further agreed that if at any time the party of the second part shall suffer a rebate of twenty-five (25) per cent. from the price of any water delivered to the City of Bayonne because of inferiority of the quality of such water, as provided in said contract, then the party of the first part shall suffer and allow

a rebate of twenty-five (25) per cent. of the price due to it under this contract for such water; such rebate to apply to the same quantity of water as that upon which the party of the second part suffers a rebate, and no more.

*Third.* It is further understood and agreed, that in the event of the inability, failure or neglect of the party of the first part to provide the said supply of water of the quality agreed to be furnished by them, and to begin the delivery thereof within the time hereinabove agreed upon then the party of the first part shall pay to the party of the second part the sum of twenty-five thousand dollars ($25,000), which is hereby fixed and agreed upon as the liquidated damages of the part of the second part for such delay.

*Fourth.* The party of the second part agrees to receive from the party of the first part, its successors or assigns, all the water required for fulfilling said contract with the Mayor and Council of the City of Bayonne and for fulfilling any contract it may hereafter acquire for supplying water for consumption and use on Staten Island in the State of New York and not elsewhere, and to pay for the same thirty-five (35) per cent. of the entire gross receipts arising from the sale of said water, free of any charge or deduction whatever, it being understood as a part of this agreement, that no water shall be sold by the party of the second part to consumers in any other territory than that above mentioned nor at a lower schedule of prices nor of a higher standard of quality than is specified in the contract with the City of Bayonne above mentioned, except by further agreement made and had in writing between the parties hereto.

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*Fifth.* The party of the second part agrees forthwith in good faith to proceed to obtain the necessary rights of way and to construct a cast iron or steel pipe of at least thirty (30) inches diameter from the corner of Belleville and Kearney Avenues in said Township of Kearney to the City of Bayonne (and to construct the necessary reservoirs and other works in Bayonne and elsewhere) for the conveying and delivering of said water to the City of Bayonne under said first mentioned contract and to use all due diligence to complete said pipe line and other works and to begin to receive said water within six months from the date hereof; but the party of the second part shall not be liable for damages for failure to complete said works, provided that if said works are not fully completed and water received for the City of Bayonne under this contract within two years from the date of this contract, then the party of the first part may at its option by written notice to the party of the second part terminate and rescind this contract and the same shall upon the giving of such notice be absolutely null and void.

*Sixth.* It is expressly agreed and understood that the party of the first part shall have the right to the use of said pipe line when constructed for the conveyance of its water and to tap the same at any and all convenient points for the purpose of conveying said waters to its customers; and the party of the second part agree in constructing said pipe line to put in taps and connections at such points as shall be indicated by the party of the first part, and also to allow said pipe

line to be tapped after it is constructed; if necessary or convenient for the purpose aforesaid; all such taps and connections to be made at the expense of the party of the first part.

35 *Provided always,* that the party of the second part shall at all times have the first right to draw water and the right to draw all the water it may require for the supply of the City of Bayonne and for the supply of Staten Island under existing or future contracts as above specified.

*Seventh.* All payments for water shall be made by the party of the second part to the party of the first part at its principal office in New York or New Jersey as may be specified, on the day next following the receipt of the principal sums by the party of the second part under such contracts as they now have or may have.

*Eighth.* The party of the second part further agrees in case it shall be found that any power or rights now possessed by the City of Bayonne, or that may be acquired by the party of the second part, under said contract with Bayonne, in respect to the prevention of the pollution of any water, or the prevention of injury to any portion of the works constructed for the supply of water, or the punishment of such injury, or the condemnation of land, water, or water rights, may be advantageously used or exercised for the purpose of this contract so far as it has or may acquire the power to do so, to put such powers or rights in force, or permit the parties of the first part or their assigns, so to do in the name of the party of the second part, or in the name of the City of Bayonne, if so empowered, but at the expense of the party of the first part, its successors or assigns.

*Ninth.* This contract shall continue for a period of twenty-four (24) years and two months, with the continuing option in the party of the second part, its successors and assigns, to renew the same upon like terms and conditions as herein contained, for successive periods of twenty-five (25) years each, forever, upon giving one year's written notice of such intent to renew to the party of the first part, its successors or assigns.

36 *In witness whereof,* the parties hereto have caused these presents to be sealed with their common or corporate seals, and the same to be signed by their proper officers, by virtue of the authority vested in them.

[SEAL.] EAST JERSEY WATER COMPANY,
By HENRY S. DRINKER,
*V. President.*

Attest:
D. L. BAIRD, *Secretary.*

[SEAL.] NEW YORK & NEW JERSEY WATER COMPANY,
By CHARLES E. CLARKE, *Pres.*

Attest:
P. H. MAISON, *Secretary.*

## Exhibit E.

*Contract Hudson County Water Co. with Staten Island Rapid Transit Co. Dec.* 31, 1904.

*This agreement,* made this 31st day of December, 1904, by and between the Hudson County Water Company, party of the first part, and the Staten Island Rapid Transit Railway Co., the Staten Island Railway Co., and the Baltimore & New York Railroad Co., parties of the second part, *witnesseth:*

*Whereas,* the party of the first part proposes to construct a system of water works in the Borough of Richmond, in the City of New York, and upon the completion of said works will have sufficient capacity and facilities to furnish to the parties of the second part a complete supply of water for the use of their locomotives, shops, steam-boats, power houses, and the extinguishment of fires, as hereinafter specified.

37 *Now therefore,* in consideration of the payment of One Dollar by each of the parties hereto to the others, receipt of which is hereby acknowledged, and of the mutual covenants and agreements herein contained, it is agreed:

I. The party of the first part hereby agrees to deliver to the parties of the second part all the water which the parties of the second part may require for the uses and purposes hereinafter stated, or for any other purpose, along the lines of their Railroads in Staten Island, between West New Brighton and Clifton, both inclusive, and at any other points along the lines of the Railroads of the said parties of the second part, or either of them, to which the party of the first part may lay its pipe lines, and to begin the delivery of a full and complete supply of water for the purposes named, at all points between West New Brighton and Clifton, within one year from the date of this contract.

II. The party of the first part covenants and agrees that the water to be supplied by it under the provisions of this contract shall be of good quality, shall not be taken from wells, but from suitable surface sources (lakes and streams), and before delivered shall be filtered by complete and modern methods, in order that the same may, as far as practicable, be pure and suitable for boiler and other purposes. The party of the first part also agrees that if at their water plant a plant for chemically treating water is installed during the period of this contract, that the water furnished the parties of the second part will be given the benefit of this treatment.

III. The parties of the second part hereby agree to purchase from the party of the first part, during the term of this agreement, and any extension thereof, their entire supply of water at all points on their said lines of railway between West New Brighton and Clifton, and at any other points on the lines of said railways to which

38 the pipe lines of the party of the first part may extend; and to accept delivery thereof in the manner herein specified, and

to pay for the water supplied to them under the terms of this agreement at the following rates, namely:

One hundred dollars ($100.00) per one million gallons of water used during the first ten years;

Ninety-five Dollars ($95.00) per one million gallons of water used during the second ten years; and

Ninety Dollars ($90.00) per one million gallons of water used thereafter for the remaining term of this agreement and any extension thereof.

All water delivered to be measured by meters at points of intake and delivery; said meters to be furnished by the party of the first part, but to be subject to the examination and checking, at all reasonable times, by representatives of the parties of the second part.

It is also agreed that, if during the period of this contract, or any extension thereof, a lower price on water is quoted to any other party than that given to the parties of the second part, the latter party shall be given the benefit of such lower price, and on the same terms thereof.

IV. The term of this contract to be for a period of twenty-five years from the date of the first delivery of water hereunder; with the privilege to the parties of the second part of continuous renewals thereafter, for successive periods of twenty-five years, at and for the price last above named, or at any lower price which is given to any other parties.

V. All water delivered hereunder shall be billed to the Staten Island Rapid Transit Railway Company, who shall pay for the same on the 10th of each month for water delivered to any of the parties of the second part hereunder during the previous month; and the said Staten Island Rapid Transit Railway Company shall, at its own expense, establish such a system of meters and checks as will at all times enable it to apportion to each of the parties of the
39 second part hereto its respective amount of each bill rendered by the party of the first part for water delivered in any month. It is specifically agreed that the prices herein contained are given only for water to be furnished to the parties of the second part, or to transportation properties affiliated with them for their own use and consumption, and that no water purchased by them under this agreement shall be resold to other consumers, save and except with the written consent of the party of the first part.

VI. The party of the first part agrees that if, during the period of this contract, the water furnished becomes and remains unsuitable for boiler purposes, that the Railway Companies shall be privileged to discontinue taking their boiler water from the said party of the first part.

VII. As a consideration for the execution of this agreement, the parties of the second part hereto hereby grant and convey to the party of the first part, for the term of this contract and any extension or renewal thereof, the right, license and easement, to levy, maintain and operate one pipe not to exceed thirty inches in diameter, or two pipes not to exceed sixteen inches in diameter, along the rights of way of the parties of the second part, extending from a point

on the Kill von Kull, near West New Brighton Station to South Beach, and from Clifton to Tottenville, and any other rights of way now owned, or which may hereafter be acquired on Staten Island by the parties of the second part, or any of them; with the right to enter upon the rights of way and property of the parties of the second part to make all necessary repairs, and to make such side or service connections as may be necessary in the business of the party of the first part, and to repair the same. The parties of the second part do not, however, agree to provide or convey to the party of the first part any greater right or title than they themselves legally own, nor will they be required or expected to go into court and prove their
40 rights, but will render reasonable assistance to the party of the first part in any such suits it desires to prosecute.

VIII. The parties of the second part also agree to aid the party of the first part in every possible way in securing any necessary franchises, ordinances or licenses for the laying of pipes and connections, or otherwise, and any expense so incurred by the parties of the second part will be reimbursed to them by the party of the first part.

IX. At the expiration of the period of this agreement, the party of the first part shall have the privilege of a renewal of the right of way, license and easements, hereinbefore provided, for the maintenance and operation of its mains, branches and service connections, which at such time shall have been laid, and to lay additional service connections to its mains and to repair both the mains and service connections, for successive periods of ten years each, upon such an agreed rate of annual rental as may be fixed by arbitration, one arbitrator to be appointed by the party of the first part hereto, one arbitrator to be appointed by the parties of the second part hereto, and the two so appointed to select the third; it being understood, however, that this rental to be paid does not affect the rights of the parties of the second part to continue taking water from the party of the first part at the minimum price arranged for in Paragraph III.

X. The party of the first part agrees to save the parties of the second part harmless from all damage or expense due to its water mains, branches or service connections being constructed, altered or repaired; and from injury to any employés, or others, and from all costs and expense incident to the equipping and maintaining of such pipe lines; unless such damage or costs be caused by gross negligence of the servants of the parties of the second part.

XI. In case of a change in the grade or location of the rail-
41 way lines of the parties of the second part, or the making of any other improvements or changes, the party of the first part agrees to change the grade or location of its lines, where necessary, on such right of way without cost to the parties of the second part. The parties of the second part not to be responsible for damage to pipe line or connections due to the handling of its business or the running of its trains, or to other cause connected with its business. Nothing in this agreement is to be understood as prohibiting the parties of the second part from using any kind of power it elects in the operation of its railway lines.

XII. The party of the first part agrees that within the period of

one year from the date of this agreement, save and except delays caused by acts of God, or the intervention of Courts, or other causes beyond its control, that it will lay a main or mains sufficient to provide amply for the requirements of the parties of the second part, at all times, as far as St. George and Clifton. The work of laying the pipe lines, branches and connections of the party of the first part upon the rights of way of the parties of the second part, shall be done under the direction of the Engineer of the parties of the second part, and at such locations as he may direct. The parties of the second part shall not be expected to take water from the party of the first part at points to which the main lines of the party of the first part have not been laid.

XIII. The party of the first part agrees to provide ample water for the requirements of the parties of the second part, and any other customers or consumers for whom it may provide connections with its mains. The source of supply to be the tapping of the main line of the New York and New Jersey Water Company above the City of Bayonne in New Jersey and the running of a new line therefrom to Staten Island. The party of the first part to connect up with the present water lines or pipes of the parties of the second part, and to provide a reasonable number of fire hydrants, namely, four
42 at St. George, two at Clifton, and one at each passenger station which is passed by the water mains; free of any charge other than the water which they consume, and also to provide such meters as may be necessary for properly measuring the consumption of water used by the parties of the second part. In case of the Railroad Companies desiring additional connections, beyond those at present existing, the party of the first part will tap its mains and make such connections, charging the Railroad Company with the cost of such connection and pipe, from the main to the points of delivery, but not including the cost of tapping the mains.

XIV. The water works Construction Company having furnished to the parties of the second part forty-three hundred feet of 6-inch, cast-iron water main, which the parties of the second part have laid along their right of way from Arietta Street to St. George, and the said main having been purchased by the party of the first part from the said Construction Company, it is agreed that the same shall be and become the property of the party of the first part, but shall remain in the use and service and under the control of the parties of the second part until the water plan contemplated by this agreement shall have been built by the party of the first part or its assigns, when it shall become subject to the use and control of the party of the first part or its assigns; and the parties of the second part having laid from Arietta Street to Clifton, a distance of about one and one-tenths miles, a 6-inch cast iron pipe, the party of the first part agrees that upon completion of its works as hereinabove referred to, and the introduction of water by it in accordance with the terms of this contract, it will purchase from the parties of the second part the said one and one-tenths miles of pipe so laid, at such a fair valuation as may be mutually agreed upon by the officials of the several parties hereto; and failing such agreement, upon a valuation to be fixed by an engi-

neer to be named by the then Vice-President of the Staten
43 Island Rapid Transit Railway Company and the President of the party of the first part; but nothing in this agreement contained shall be construed as in any way impairing the right of the party of the first part to lay, maintain and operate two 16-inch pipes along the right of way of the parties of the second part as provided in this agreement.

XV. The Crystal Water Company, of Edgewater, Staten Island, and the Staten Island Rapid Transit Railway Company, by their letters dated November 28th, 1903, and February 4th, 1904, respectively, having made an agreement under which the said Crystal Water Company undertook to supply the parties of the second part with water for a term expiring May 1st, 1905, at ninety-five cents per one thousand cubic feet of water, and for a further term of five years from May 1st, 1905, provided that the said The Staten Island Rapid Transit Railway Company should renew such agreement for a further period of five years from May 1st, 1905, at ninety cents per one thousand cubic feet of water, the party of the first part hereby agrees, in consideration of the non-renewal of said agreement with the said Crystal Water Company, that the party of the first part, between the first day of May, 1905, and such time as the party of the first part shall complete the laying of its pipes and mains to Clifton and St. George, and shall begin the delivery at said points of a full and complete supply of water to the parties of the second part, will pay to the said parties of the second part the excess over ninety cents per one thousand cubic feet which shall be charged to the said parties of the second part by the said Crystal Water Company at said points, provided that the parties of the second part shall take all proper legal or other steps, suggested by the party of the first part, to minimize and reduce said excess charges, but at the cost and expense of the party of the first part. A statement of such excess shall be rendered
44 monthly to the party of the first part and shall be paid within thirty days thereafter. No delivery of water made to the parties of the second part by the Crystal Water Company shall be deemed a compliance by the party of the first part with the provisions of this agreement relating to the construction of its pipe lines and delivery of water to the parties of the second part therefrom.

XVI. In the event of any dispute arising as to the meaning or interpretation of any provision of this agreement, or as to the rights or obligations of the parties hereto, it is mutually covenanted and agreed that the same shall be submitted to and decided by a committee of arbitration, one of whom shall be selected by the party of the first part, one by the parties of the second part, and these two to select a third arbitrator,—and the decision of a majority of said committee of arbitration shall be final, effective and binding upon the parties hereto; but, in the event of the failure to receive an award under such proposed arbitration within sixty days after one of the parties shall have notified the other of its appointment of an arbitrator the parties hereto shall be relegated to their legal rights as to the question at issue.

XVII. It is covenanted and agreed that in any case this contract

for the purchase of water is for a period not longer than twenty-six years from the date of execution, and that after that period a rental as outlined will be paid for the use of the rights of way of the parties of the second part, regardless of whether the Railway companies shall continue to use the water of the party of the first part or not.

XVIII. This contract shall be binding upon the parties hereto, their successors and assigns, according to its provisions, for and during the term of twenty-five years from the date of the first delivery of water thereunder, and for such renewals or extensions thereof as may be made under the provisions of this agreement; but the party of the first part shall have no power to assign this contract, nor any of the rights granted it hereunder, to any municipal corporation without the written consent of the parties of the second part to such assignment.

*In witness whereof*, the parties hereto have caused these presents to be signed in triplicate by their duly authorized officers, and their corporate seals to be hereunto affixed the day and year first above written

HUDSON COUNTY WATER COMPANY,
By SAMUEL S. MOORE, *President.*

[SEAL.] Attest:
CLARENCE F. WALKER, *Secretary.*

STATEN ISLAND RAPID TRANSIT RAILWAY CO.,
By GOO. H. CAMPBELL.,
*Vice-President.*

[SEAL.] Attest:
S. P. KRETZER,
*Assistant Secretary.*

STATEN ISLAND RAILWAY CO.,
By GEO. H. CAMPBELL,
*Vice-President.*

[SEAL.] Attest:
EDWARD CURREY,
*Assistant Secretary.*

BALTIMORE & NEW YORK RAILWAY CO.,
By GEO. H. CAMPBELL,
*Vice-President.*

[SEAL.] Attest:
GEORGE M. KEASBEY,
*Assistant Secretary.*

46 EXHIBIT F.

*Bond and Contract. City of New York with Hudson County Water Co. May 25, 1905.*

Know all men by these presents:

That we, the Hudson County Water Company, a corporation of the State of New Jersey, and the United St-tes Fidelity and Guaranty Company, a corporation of the State of Maryland, are held and firmly bound unto The City of New York, in the sum of One Hundred Thousand ($100,000) Dollars, lawful money of the United States of America, to be paid to the said The City of New York, or to its certain attorneys, successors or assigns, for which payment well and truly to be made, we and each of us do bind ourselves and our several and respective successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, dated this 25th day of May, One Thousand Nine Hundred and Five.

Whereas, the above bounden, the Hudson County Water Company, by an instrument in writing under its corporate seal, and bearing even date herewith, one original copy of which is hereto annexed, has contracted with the said The City of New York, by the Commissioner of Water Supply, Gas and Electricity, to furnish and deliver to the said The City of New York, an ample and abundant supply of pure and wholesome water for the uses and purposes of the Borough of Richmond, in the City of New York, as is fully and at large set forth and described in the contract aforesaid.

*Now therefore,* the condition of the above obligation is such that if the said above bounden the Hudson County Water Company, its successors or assigns, or any or either of them, shall well and truly perform or cause to be performed the said contract and each and every of the covenants, promises, agreements and provisions therein
47 contained to be performed, and complete the same within the period therein stipulated, and in each and every respect comply with the conditions therein contained, this obligation to be void; otherwise to remain in full force and virtue.

HUDSON COUNTY WATER COMPANY,
By TURNER A. BEALL, *President.*

Attest:
[SEAL.] CLARENCE F. WALKER, *Secretary.*

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By JOHN R. BLAND, *President.*

Attest:
GEO. R. CALLIS, *Secretary.*

Approved as to form.

G. L. STERLING,
*Acting Corporation Counsel.*

(Proper affidavits annexed.)

*Agreement*, made this 25th day of May, 1905, by and between the City of New York, a municipal corporation of the State of New York, by John T. Oakley, Commissioner of Water Supply, Gas and Electricity of said corporation, hereinafter called the City of New York (as authorized by Chapter 466 of the Laws of 1901), party of the first part, and the Hudson County Water Company, a corporation of the State of New Jersey, hereinafter called the Water Company, party of the second part:

Whereas, the said Water Company is duly incorporated under and pursuant to the provisions of the law of the State of New Jersey, and controls an abundant supply of pure and wholesome water; and

Whereas, the said Commissioner of Water Supply, Gas and
48 Electricity has duly examined into the sources of water supply of the said Water Company, and has determined that the same is wholesome and adequate for furnishing the quantity of pure and wholesome water to the City of New York for the uses and purposes of the Borough of Richmond and its inhabitants, which the Water Company hereinafter agrees to furnish; and

Whereas the Commissioner of Water Supply, Gas and Electricity of the City of New York has agreed with the said party of the second part as to the terms and conditions upon which the said party of the second part will supply water for the purposes aforesaid; and

Whereas the proposed contract, in all its details was submitted to the Board of Estimate and Apportionment of the party of the first part, which assented to and approved of the execution of the said contract as submitted, by resolution adopted May 19th, 1905; and

Whereas the proposed contract in all its details was submitted to the Mayor and the Comptroller of the City of New York, and the separate written consent and approval of both was obtained respectively on the 29th day of May, 1905, and on the 29th day of May, 1905, to the execution of said contract as submitted;

*Now therefore, this agreement witnesseth:*

That in consideration of the mutual covenants contained, and of the expenditures to be made by the Water Company for construction for the purpose of this contract, it is mutually agreed by and between the parties hereto, as follows:

I. That the said Water Company shall, within one year after the execution and delivery of this contract, lay two water mains, not less than 30 inches in diameter each, to connect its water mains in the City of Bayonne, N. J., with the water mains of the City of New York, at the intersection of Richmond Terrace and Van Street, West New Brighton, in the Borough of Richmond, in the City of New York, or at such other convenient point or points as may hereafter be mutually agreed upon in writing between the City of New York and the Water Company.

49 II. The Water Company shall forthwith, upon the completion of such connections, furnish and supply through such connections from its water mains, to and into the water mains of the City of New York, an adequate supply of pure and wholesome filtered water for all the purposes for which the said City of New York may lawfully use, sell or supply water in said Borough

of Richmond, as may be required by the City of New York; and thereafter while this contract shall remain in force, the said Water Company shall continue so to furnish such an adequate and ample supply of pure and wholesome filtered water to the City of New York, at a pressure at the above mentioned point of connection of 60 pounds to the square inch.

III. The City of New York agrees to proceed with all due diligence and as rapidly as possible to construct and install in the said Borough of Richmond an adequate system of piping, pumping and reservoirs for the distribution of said water; and upon the completion of the same the City of New York also agrees to purchase and accept from the Water Company, and to take, from the beginning of the delivery of water under this agreement, a minimum quantity of three million gallons per day, and in addition thereto, such further quantity as shall be necessary from time to time, at the following rates, namely:

For the first four million gallons purchased each day, $70 per million gallons;

For the fifth million gallons purchased each day, $65;

For the sixth million gallons purchased each day, $60;

For the seventh million gallons purchased each day, and for all thereafter, $55 per million gallons.

Payments are to be made monthly, within thirty days after the voucher for the same is presented to the Comptroller for the quantity of water furnished during each next preceding month, according to meter register; and in the event that the average daily consumption during any month shall not equal the agreed minimum quantity of three million gallons per day, the City of New York shall pay, as an alternate fixed and agreed price for the amount of the water actually taken during the said month, the sum of $210.00 per day.

IV. The Water Company is to carefully measure all water delivered under this contract, by meters set for that purpose at the point or points of connection with the City of New York's distributing system, and the City of New York by its proper officials of its Department of Water Supply, Gas and Electricity, shall at all times have reasonable opportunity to inspect, examine and test the meters and appliances for measurement, and if the same be found to register incorrectly, the proper adjustment of the bills for water is to be made, by arbitration if necessary, one arbitrator to be named by the City of New York, one by the Water Company, and a third to be selected by those two, and the decision of the majority to be binding upon both parties, and the expense of such test and arbitration to be divided equally between the Water Company and the City of New York; the adjustment of the bills so to continue until the meter has either been repaired or a new one substituted that shall work satisfactorily.

V. The Water Company agrees to file with the City of New York, simultaneously with the execution and delivery of this contract, a satisfactory surety company bond, in the sum of One Hundred

Thousand Dollars, conditioned upon the faithful performance of this contract by the Water Company.

VI. The Water Company agrees to complete the work and begin the delivery of water hereunder within one year from the date of this contract, as hereinabove provided, unless prevented or delayed by reason of strikes, accidents, litigation, or other cause unavoidable or beyond the control of the Water Company, and any time lost by such delays shall not be computed within the said year, but shall be added thereto.

VII. This contract shall continue in force for a period of
51 ten years from the date of the first delivery of water hereunder, with the privilege to the City of New York to renew the same for a second period of ten years, upon the same terms and conditions, by giving to the Water Company one year's notice in writing of its intention so to renew; and the provisions thereof shall be binding upon and apply to the successors and assigns of the parties hereto.

VIII. Nothing herein contained shall be construed to prevent the City of New York from buying or otherwise obtaining any portion of its supply of water for the Borough of Richmond from the water companies now in the said Borough, or from a plant or plants of the City, if the City should so desire; nor shall this contract be construed in any manner as an agreement to buy the water supply for the Borough of Richmond from the Hudson County Water Company exclusively. And the agreement of the City to construct and install an adequate system of piping, pumping and reservoirs shall not be construed to prevent the City, if it so determines from purchasing or otherwise acquiring the plants and systems now in the Borough of Richmond, or such part thereof as shall be desired.

In witness whereof, the parties hereto have caused their names to be signed to these presents, by their duly authorized officers, and their corporate seals to be hereunto affixed, the day and year first above written.

THE CITY OF NEW YORK,
By JNO. T. OAKLEY,
*Commissioner of Water Supply, Gas and Electricity.*
HUDSON COUNTY WATER COMPANY,
By T. A. BEALL, *President.*

Attest:
[SEAL.] CLARENCE F. WALKER, *Secretary.*

Approved as to form.
G. L. STERLING,
*Acting Corporation Counsel.*

52 I, George B. McClellan, Mayor of the City of New York, do, pursuant to Section 471 of the Charter of the said City, hereby consent to and approve of the foregoing proposed contract, in all its details.

GEO. B. McCLELLAN,
*Mayor of the City of New York.*

I, Edward M. Grout, Comptroller of the City of New York, do, pursuant to Section 471 of the Charter of the said City, hereby consent to and approve of the foregoing proposed contract, in all its details.

EDWARD M. GROUT,
*Comptroller of the City of New York.*

STATE OF NEW YORK, *City and County of New York, ss:*

On this first day of June, 1905, before me personally came and appeared John T. Oakley, who being by me duly sworn, did depose and say: That he is the Commissioner of Water Supply, Gas and Electricity of the City of New York; that as such Commissioner he signed the foregoing contract on behalf of the City of New York after due approval thereof by the Board of Estimate and Apportionment, and the separate written consent and approval of the said contract in all its details by the Mayor and Comptroller.

JNO. T. OAKLEY.

Sworn to before me, this first day of June, 1905.

WM. M. BLAKE,
*Notary Public No. 225, N. Y. Co.*

STATE OF NEW YORK, *City and County of New York, ss:*

On this twenty-fifth day of May, 1905, before me personally came and appeared Turner T. Beall, to me known, who being by me duly sworn, did depose and say: That he is the President of the
53 Hudson County Water Company; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

TURNER A. BEALL.

Sworn to before me, this 25th day of May, 1905.

A. W. STUMP,
[SEAL.] *Notary Public, New York County.*

In Chancery of New Jersey.

Between—

ROBERT H. MCCARTER, Attorney General of the State of New Jersey, on the Relation of HENRY B. KUMMEL, State Geologist, Informant,

and

HUDSON COUNTY WATER COMPANY, Defendant.

On Information.

*Final Decree.*

(Filed September 19, 1905.)

This cause coming on to be heard on bill and answer and such written agreements referred to in the bill and answer as were produced and offered in evidence on the hearing under stipulation of the solicitors of the parties, namely:

A contract between the city of Bayonne and the New York and New Jersey Water Company, made by ordinance, approved
54 June 24th, 1904, and accepted June 28th, 1904.

An assignment by the New York and New Jersey Water Company to the Richmond Water Company, dated November 30th, 1904.

An agreement between the New York and New Jersey Water Company and the Richmond Water Company, dated May 16th, 1903.

A certificate of the change of name of the Richmond Water Company to the Hudson County Water Company, dated December 12th, 1904.

An agreement by the East Jersey Water Company with the New York and New Jersey Water Company, dated July 12th, 1895.

An agreement between the Hudson County Water Company and the Staten Island Rapid Transit Railway Company and others, dated December 31st, 1904.

An agreement between the city of New York and the Hudson County Water Company, dated May 25th, 1905, and upon the further admission that the East Jersey Water Company and the defendant, respectively, are corporations organized under and pursuant to acts of the Legislature of the State of New Jersey, entitled "An act concerning corporations," approved April 7th, 1875, and its supplements and amendments, and "An act concerning corporations (Revision of 1896)," respectively, and Robert H. McCarter, Attorney-General, appearing on behalf of the State of New Jersey, and Gilbert Collins, on behalf of the defendant, and the counsel having been heard and their arguments duly considered.

It is thereupon, on this nineteenth day of September, nineteen hundred and five, on motion of Robert H. McCarter, Attorney-General, ordered, adjudged and decreed, and the Chancellor doth, by virtue of the power and authority in him vested, order, adjudge and

decree that the informant is entitled to the relief prayed for in the said amended information, and that the Hudson County
55 Water Company be and it is hereby enjoined from carrying or transporting into Staten Island, or the State of New York, or elsewhere out of the State of New Jersey, any of the waters of the Passaic river, and that a permanent injunction shall issue accordingly, and that the defendant shall pay to the informant his costs of this suit to be taxed, and that execution issue for the collection thereof in due course.

W. J. MAGIE, *C.*

Respectfully advised,

J. J. BERGEN, *V. C.*

*Opinion.*

Mr. Robert H. McCarter, Att'y-Gen., for informant.
Mr. Gilbert Collins, for defendant.

BERGEN, *V. C.:*

The East Jersey Water Company is diverting water from the Passaic river, at Little Falls, in this State, for commercial purposes, and has agreed with the New York and New Jersey Water Company to sell and deliver to it so much thereof as it may require to supply consumers, not alone in this State, but in the State of New York, without limitation as to quantity; the only consumer in this State being the city of Bayonne and its inhabitants. It is admitted that after the making of the contract the New York and New Jersey Company constructed its plant, and that its main pipes to and through Bayonne were of a capacity greater than the needs of that city demanded, and designedly so in order that through them sufficient quantity of water might be transported into New York State, for the purpose of sale and delivery, to such consumers as it might there secure; that in 1904 a contract was made with the city of Bayonne, under
56 which additional mains were allowed to be laid in the streets of that city for the purpose, among others, of carrying water to purchasers beyond its territory, the object being to transport water beyond the State of New Jersey, which contract was, shortly after its execution, duly assigned to the defendant; that the defendant has laid the mains and intends to supply water drawn from the Passaic river for the use of purchasers in the State of New York, which water the defendant intends to transport to that State through pipes and conduits laid, and to be laid, for such purpose; that the defendant confesses such to be its purpose, and has already entered into contracts with persons and corporations, private and municipal, to convey water to be taken from the Passaic river, obtained through the East Jersey Water Company, into the State of New York for the use therein; that some of these contracts were prior and others subsequent to the approval of the legislative act, which the informant insists makes unlawful the threatened acts of the defendant and justifies this court in interfering.

It is further admitted that the Passaic river is the most important of the available sources of water-supply for the people of New Jersey, a necessity for the use of which is constantly increasing; that the present available supply of water in the Passaic is largely in excess of the present consumption by New Jersey inhabitants, as now supplied, and that the defendant had incurred large expense in laying mains and doing other necessary work to enable it to take the water to New York State previous to the adoption of the statute now under consideration.

On May 11th, 1905, an act of the Legislature of this State was approved and became immediately effective, which, after declaring that the fresh-water streams of the State do not increase with the growth of its population, and unless carefully preserved, a condition will exist detrimental to the health and prosperity of the citizens of
57 this State, enacted as follows: "It shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches or canals the water of any fresh-water lake, pond, brook, creek, river or other stream of this State into any other state for use therein," and empowered this Court to aid in its enforcement. (P. L. 1905, page 461.)

The information is filed by the Attorney General, and seeks to restrain the defendant from taking waters diverted from the Passaic river into the State of New York for use therein. This the defendant admits it intends to do, in violation of the terms of the act, alleging that the act is void, because (*a*) it impairs the obligation of contracts in force when the act was passed; (*b*) it takes property without compensation; (*c*) it provides for an interference with commerce between the States; (*d*) it denies to citizens of other States the privileges of citizens of this State, and denies them the equal protection of the laws of New Jersey; (*e*) it is in violation of the constitutions of the United States and of th s State.

The question is thus presented, can the defendant, through the East Jersey Water Company, or by other means, divert from the Passaic river, free from any control or regulation by the State, whatever quantity it may desire of the fresh water running therein and carry it to another State, the consent of parties in interest other than the State being assumed?

An absolution from control or regulation means the right to withdraw against the protest of the State every drop of water from the river, a right which can only be sustained upon the ground of ownership, the fact that the defendant is a purchaser from another corporation does not alter the proposition, for its property rights, if any, are no greater than those of the original abstractor from whom it purchases.

The statement of the proposition indicates the serious import of the matters involved, for if the contention of the defendant
58 expresses the law, persons and corporations may, by acquiring the private rights in any running stream, obtain such an ownership in the water passing down the stream as to permit its total withdrawal and transportation to a foreign jurisdiction, leaving the citizens of this State entirely destitute of a natural and necessary

element of life so far as the same may be derived from streams supplied from the running surplus or overflow of water from lakes, ponds, springs and other natural sources of potable water.

If the public have any common rights in or to the running waters of our rivers and streams at any point during its flow to the sea, such a right is manifestly held by the State in trust for the public, and it by virtue of its sovereign power, may grant or restrict the appropriation thereof so long as it does not interfere with the reasonable rights of other owners of land over which it flows, and any unauthorized diversion of such water above the point where the public rights appear, is a wrong of which the State may justly complain and seek to restrain, and the fact that it has not heretofore objected is no reason why it may not now protest against a further spoliation of public property. It may lawfully permit its own citizens the benefit of property held in trust for them and at the same time limit such permission to those who have a common right therein.

That the Passaic river is a tidal stream, the bed of which, so far as the tide ebbs and flows, is the property of the State, is a fact the Court will judicially notice, and the State, if a riparian owner along such stream, is entitled to have the ordinary flow of water remain in the channel, and to have it come to its lands "undiminished in quantity and unimpaired in quality by the act of any other of the owners thereof, subject to the use of the passing water, in a reasonable manner, for domestic and irrigation purposes." Doremus *v.* Patterson, 20 Dick 711. And the State upon whose lands it is finally
59 cast before it mingles with the ocean and becomes the property of the world is endowed with all the rights thereto which are accorded by law to the preceding owners of land through which it flows, and any diversion of what, undiverted, would flow to and over the lands of the State, and thus become public property, is the subject of legislative action, the method employed by the public to express its wishes. In my opinion, running water having served its transient uses as it passes by comes to the lands of the State freed from any charge on behalf of the upper land owner, except such as he may have as one of the public, and that it is the duty of the State to guard its riparian rights as zealously as does the individual. Being convinced that the State, as the lower riparian owner, has the right to have the water of streams flowing into tidal rivers reach its property undiminished in quantity, within the rule above expressed, I can see no reason why it may not regulate and control the manner of the disposition of its property rights, for acquiescence in the diversion of water which of right ought to flow to its lands is surrender of property interests, the extent of which it may limit.

The objection that the questioned law is void as a violation of the Federal Constitution regarding interstate commerce does not appeal to me, for we could not consistently say that an effort on the part of the State to preserve the common property, whether in the interest of navigation or for the domestic uses of the public after it had satisfied the proper private charges against it, could be frustrated simply because the unlawful abstractor of its property intends to transport it into another State. The defendant and those under

whom it claims are corporations organized under the general corporation act of this State, which I cannot discover confers any right to carry on this business other than that it is a "lawful business"; certainly there is no grant of any power or right under which it can be said the State has abrogated any of its rights in the running
60 waters of the State or authorized these corporations to divert from its proper channel and water course the common property of the public, and my conclusion is that the law assailed does not violate constitutional requirements either Federal or State, and being a mere regulation of the extent to which a diversion of public property, permitted but not given, may go, is valid legislation.

Whether this act be valid or not, under the view I take of this question, the State may rest its case upon general principles, and does not need the support of the statute under review. The State has a duty to perform in that it must protect its citizens against the assumption by individuals or corporations of any of its sovereign rights, or the conversion to private use of such common property and rights as the State is said to hold in trust for the public use, the loss of which may destroy the health and comfort of its subjects. "The policy of the law is to assign to everything capable of ownership a determinate owner. If capable of occupancy, and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership, but if such private ownership and enjoyment are inconsistent with the nature of the property, the title is in the sovereign as trustee of the public holding it for the common use and benefit." Cobb *v.* Davenport, 3 Vr. 369-378. The question considered in the case last cited turned upon a right of fishery in non-tidal waters, and the learned jurist who read the opinion of the Court was not called upon to, and did not, define the quality of ownership to be gained in running water, and while he defined public waters as tidal and waters non-tidal as private, he cannot be taken to have meant that, beyond the right of fishing, there is any exclusive ownership in running water vested in one land owner along such a stream against another, and while one may have such an ownership in the land over which the water passes
61 as to control an interference with the water and the taking of fish therein while the water and fish are over his land, it was not decided that a permanent continuous property in running water attached to any riparian owner; on the contrary, he declared the law to be that if such private ownership is inconsistent with the nature of the property, *i. e.*, if not capable of occupancy or susceptible of private ownership and enjoyment, the title rests in the sovereign; and certainly a vested continued ownership by a private land owner of running water would be inconsistent with the nature of the property. "Water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein." 2 Blk. Com. 18. In Angel on Water Courses, Sec. 95, the writer well expressed the law in these words, "but strictly speaking, he (the riparian owner) has no property in the water itself, but simply a use of it while it passes along. The consequence of this principle is

that no proprietor has the right to use the water to the prejudice of another."

The Roman law considered running water as public or common, in the sense that all might drink it, or apply it to the necessary purposes of supporting life, and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only; and by the law of England, water flowing in a stream is *publici juris*, subject to the rights of adjacent land owners, as defined by law, Mason *v.* Hill, 5 Barn. & Adol. 23, Eng. R. Cases, vol. 25, 382. There are some things, says Blackstone, which, notwithstanding the general introduction and countenance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession, and no longer.
62 Such (among others) are the elements of light, air and water. Blk. Com. 2 Vol. 14.

Thus it appears from immemorial times running water, as one of the elements of life, health and comfort, has been esteemed common property, subject to usufructuary use by the owners of land over which it passed, a use which by legal construction, based upon public needs, has been from time to time enlarged to meet the demands of civilization, and preserve the peace of society, but it has never been extended to the point of absolute ownership, to the detriment of the lower land owner; if diverted it must be returned undiminished, except as to the incidental waste made necessary by the personal private use for domestic and other recognized lawful purposes appertaining to the land and its occupant.

The ownership of the bed of tidal rivers is vested in the State, so far as the tide ebbs and flows, an ownership which carried with it property rights in the water covering it, whether fresh or salt, for while the line of demarkation between public and private waters has been settled in this State to be the point where the tide ebbs and flows, this is not limited to a point where the salt and fresh water meet, nor to water impregnated with salt, as that would open the question to the very uncertainty, which justice Depue so strongly deprecated, in Cobb *v.* Davenport, *supra.* In Rex *v.* Smith, 2 Douglass 441, it was argued that the river Thames, above London Bridge, was not "navigable," although it was flowing and reflowing, inasmuch as the tide beyond that limit was occasioned by the pressure, and accumulation backward, of fresh water, but this distinction met with little favor, and was pronounced by Lord Mansfield as novel and inadmissible. In Horne *v.* McKensie, 6 Cl. & Fin. 628, 643, a ruling that the limit of an estuary was fixed by ascertaining "whether there was a predominance of salt or fresh water at the place" was overruled; and in Peroux *v.* Howard, 7 Peters U. S. 343, it was
63 held that although the current in the Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, if the effect of the tide upon the current is so great, as to occa-

sion a regular rise and fall of the water, it may properly be said to be within the flow of the tide.

It is common knowledge that in all of our fresh water rivers, and especially so as to the Passaic, there are long reaches or basins, where the water remains fresh, although subject to ordinary tidal influences, and as the bed of such portions of tidal streams is the absolute property of the State, in acquires by virtue of such ownership riparian rights in the flow of the water.

The position of the State is different from that of other riparian owners; large bodies of fresh water which have already served the proper purposes of private riparian owners above the lands of the State are received upon common property forming great reservoirs of a valuable natural element, necessary for the health and comfort of all the people, and in which every vestige of private right, subject to which the common right is held, has been extinguished, for the State, being the last riparian owner, has no other to account to, the owners of the upland along tidal waters having no rights therein, and the State should be considered as the ultimate owner of such unused common property, to be held in trust for the use of all its subjects.

The constant increase in our population, considered in connection with the unchanging extent of our water shed, and the consequent limit of the natural supply of water necessary for domestic and healthful purposes, may justly alarm the State with regard to the future, and a neglect to insist upon its rights in the past, when conditions did not require a strict enforcement of its privileges, works no estoppel, and justifies the restriction of the appropriation of its property.

It is admitted that the Passaic river is the most important
64 of the available sources of water supply for the people of New Jersey, and that their necessity, therefore, is constantly increasing. This river, in its natural condition, carries from its source to the ebb and flow of the tide a necessary element of life—the common property of the public—subject to usufructuary use, and finally delivers it, when not diverted, upon the public lands as free from private claim as the land upon which it rests, and when thus delivered it becomes the property of the sovereign, who may divert or permit its diversion and any obstruction or diversion, subject to the exceptions stated, which tends to diminish the quantity that should flow upon its lands is an invasion of its rights. It has a right, unless it grants it to another, to the ultimate disposition of what remains of all waters which naturally empty into a tidal stream, after the transient rights of riparian owners have been exhausted, and no one has a right to divert the water for commercial purposes without the grant of the State, in the absence of which such abstraction is the conversion of public property without legislative authority. The State may grant this right, but until it does it should be held beyond the reach of private appropriation. That the permission of the State to divert from the Passaic river water for private consumption has been recognized, is manifested by the act authorizing the construction of waterworks for Jersey City (P. L. 1852, page 419), the first section of which expressly authorizes the taking of "such portion of the water

of Passaic river flowing between the villages of Acquackanonck and Belleville as may be required to furnish the inhabitants of said city, and others residing adjacent thereto, with a sufficient quantity of pure and wholesome water for domestic and other uses," a grant of a right, limited to certain uses, then thought to be necessary before the property interests of the State could be taken.

The defendant insists that as the threatened action will not
65 now actually absorb the river, because there is yet a surplus of water not drawn and taken for New Jersey consumers, the State must wait until the diminution is appreciably affecting its citizens, but that argument does not meet the principle involved, which is, can the State regulate the diversion and application of running water which naturally empties into tidal streams, having due regard to the rights of riparian owners? The answer must be that it has, thereby conserving the common interests of its people, otherwise private enterprise may remove all potable water and sell it in another State, disregarding the riparian rights of the State and divesting it of its proper ownership in all surplus waters, which, undisturbed, would come to its possession.

My opinion is that, subject to the lawful transient rights of riparian owners along the banks of running streams, the waters of which finally empty into a tidal stream, there is vested in the sovereign power the right to insist upon the proper riparian user of the waters therein, in order that the common right to the use of the residue, which is not private property, may be preserved for the benefit of those to whom all common property belongs, nor would the grant of every owner of land along the stream from its sources to tide water affect the right of the public (for which the State is but another name), for that only can be granted which the grantor hath, which is the transitory usufruct-ory use, subject to which running water is *publici juris*. As the threatened act is an invasion of a common right, in that it will result in the removal from the State of the common property, it has a right to protect against the proposed increased diversion and should seek to protect the public estate.

Other questions were discussed on the argument, but I prefer to rest my conclusion on the reasons I have given, for I am satisfied that the State, in its sovereign right as owner of the bed of all tidal streams, becomes the owner of all fresh water flowing upon
66 its land, and that any interference with the proper flow of such water, resulting in a diminishing of the natural quantity, is the subject of equitable interference, and also that the Corporation act, under which the defendant and its agents exist, grants no right in derogation of public ownership of such water, and that without such grant the taking of water from running streams for commercial purposes is, as against the State, a wrong to be restrained, and that the restraint may be limited to such takers as the State may elect. It is, perhaps, pursuing a just policy when it permits, without objection, the taking of its property to be served to its people, but it cannot be compelled to the unauthorized extension of its gifts to citizens of another jurisdiction.

On the hearing the defendant insisted that the relief sought by

the information was confined to the question of the constitutionality of the act. If the pleadings should be so narrow as to present only this one question they may be amended to meet the real question presented and argued and which I have considered and determined.

This conclusion does not impair the obligation of contracts within the legal acceptation of the term; no vested right is affected, for the defendant has none in the subject matter, and all of its contracts were made with regard to existing conditions, of which it is presumed to have had knowledge.

The informant is entitled to a decree, and I will so advise.

67 STATE OF NEW JERSEY:

Court of Errors and Appeals, June Term, 1906.

On Appeal.

No. 5½. No. 113 of Novem. Term, 1905.

ROBERT H. MCCARTER, Attorney General, *ex Rel.*, &c.,
and
HUDSON COUNTY WATER CO.

Dated Novem. 19, 1906.
Chief Justice presiding.

Opinion by PITNEY, *J.*

| Check list. | Affirm. | Rever'l. |
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| The Chancellor.. | | |
| " Chief Justice | 1 | |
| Mr. Justice Garrison | 1 | |
| " " Fort | 1 | |
| " " Garretson | 1 | |
| " " Hendrickson | 1 | |
| " " Pitney | 1 | |
| " " Swayze | 1 | |
| " " Reed | 1 | |
| " " Trenchard | | |
| Judge Bogert | 1 | |
| " Vredenburgh | 1 | |
| " Vroom | 1 | |
| " Green | 1 | |
| " Gray | 1 | |
| " Dill | 1 | |
| | 14 | |

68 New Jersey Court of Errors & Appeals. November Term, 1905.

No. 5¾ (113).

Between—

ROBERT H. MCCARTER, Attorney General, Informant, Respondent,
and
THE HUDSON COUNTY WATER COMPANY, Defendant, Appellant.

*Opinion.*

Argued December 7, 1905; Decided November 19, 1906.

*Syllabus.*

(1) The act of May 11, 1905, (P. L. 1905, p. 461,) whereby it is made unlawful for any person or corporation to transport through pipes, conduits, etc., the waters of any fresh-water lake, pond or stream of this state into any other state, is constitutional.

(2) The first section of the bill of rights contained in our constitution, which declares that all men have certain unalienable rights, among which are those of acquiring, possessing and protecting property, etc., does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law; nor the right of disposing of property that has not been duly acquired under the law of the land.

(3) The federal constitution, Art. IV, sec. 2, in declaring that "The "citizens of each state shall be entitled to all privileges and "immunities of citizens in the several states," does not guarantee to citizens of the state of New York, while resident here, all the privileges that they would enjoy if resident in New Jersey.

(4) A charter acquired under our general corporation act of 1875 and its supplements, (Rev. 1877, p. 179, p. 1282; Gen. Stat. p. 907; P. L. 1876, p. 10;) for the purpose of damming
69 rivers and streams, and storing, transporting and selling water, cannot be deemed to authorize the depletion of our streams for the purpose of conveying water beyond the borders of this state.

(5) The act of May 11, 1905, (P. L. 1905, p. 461,) amounts to a repealer of the power of any company organized under the corporation act of 1875 and its supplements to transport water out of the state, even if such power be assumed to have been acquired under the latter acts.

(6) The general corporation act of 1896 (P. L. 1896, p. 277, sec. 6; P. L. 1899, p. 473,) does not authorize the incorporation of

companies for the purpose of diverting water from streams and storing and selling the water thus diverted.

(7) The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it.

(8) This state has not, by statute, changed the rule of the common law so as to make the water of our lakes and streams the subject-matter of commerce in the ordinary sense, nor has it authorized water diversion for other than riparian uses, saving for limited class of purposes beneficial to the people of this state.

(9) The legislative policy of this state has been, and is, to preserve and administer our water rights for the benefit of our own people, to whom by right of proximity and sovereignty they naturally belong.

(10) The State of New York, or the people thereof have no inherent right to withdraw a supply of water from the territory of New Jersey by artificial means.

(11) The control of fresh water running in the natural streams, and in lakes and ponds that have outlet in such streams, (subject to the interests of riparian owners therein,) resides in the state in its sovereign capacity as representative of and for the
70 benefit of the people in common; and the legislature may prohibit the abstraction of such water, saving for riparian uses and for purposes authorized by legislative grants.

(12) The act of May 11, 1905, (P. L. 1905, p. 461,) which forbids the abstraction of such water for transportation beyond the bounds of the state, is not in violation of the inter-state commerce clause of the federal constitution, because water abstracted contrary to the statutory prohibition cannot legitimately enter into inter-state commerce.

(13) The State of New Jersey, as owner of the bed of the Passaic River where flowed by the tide, has a proprietary right to the continued flow of the stream which is paramount to the rights of upper riparian owners to withdraw water for purposes other than those incident to riparian ownership.

On Appeal from Decree of the Chancellor Advised by Vice Chancellor Bergen, Whose Opinion is Reported 61 Atl. 710.

For the Appellant, Richard V. Lindabury and Collins & Corbin.
For the Respondent, Robert H. McCarter, Attorney General.

The opinion of the Court was delivered by PITNEY, *J.*:

The decree that is here under review awards an injunction to restrain the Hudson County Water Company from carrying or transporting any of the waters of the Passaic River into Staten Island, in the State of New York, or elsewhere out of the State of New Jersey.

The cause was instituted in the court below by the filing of an information to which the defendant (now appellant) made answer, and was heard before the Vice Chancellor upon these pleadings and

upon the proofs and admissions of the parties concerning certain matters that did not clearly appear from the pleadings. It
71 appears that the East Jersey Water Company, a corporation of this state, organized under the general corporation act of 1875 and its supplements and amendments (Gen. Stat. p. 907,) has established extensive works at Little Falls upon the Passaic River, a short distance above the City of Paterson, and diverts water therefrom daily to the amount of thirty million gallons or more for the supply of certain municipal corporations and other consumers, and is engaged in the sale of water from the river to water companies and to municipal corporations. A system of water mains has been constructed, owned in part by the East Jersey Water Company, in part by another corporation of this state known as the New York and New Jersey Water Company, and in part by the present appellant, extending from the intake at Little Falls to and into the City of Bayonne in Hudson County, which city lies upon the borders of the tidal waters of the Kill-von-kull, opposite to Staten Island. And that the Hudson County Water Company has entered into certain contracts in pursuance of which it purposes to supply certain municipal corporations and other consumers upon Staten Island from the waters of the Passaic River, employing for this purpose extensions of its water mains that are to be constructed beneath the waters of the Kill-von-kull.

The information of the Attorney General purports to be exhibited "on behalf of the state, and at and by the relation of Henry B. "Kummel, State Geologist." The status of the State Geologist as relator arises solely from a recent act of the Legislature (P. L. 1905, p. 461,) the constitutionality of which is the principal question in dispute. It is insisted by the appellant that if the act be unconstitutional there is no other basis upon which the information can be sustained. The learned Vice Chancellor, however, dealt with all the grounds upon which the prayer for injunction was rested, and we think the averments of the pleadings are broad enough to war-
72 rant this course. Not only does the information purport to be exhibited on behalf of the state, as well as at the relation of the State Geologist, but its averments include mention of many matters that would have been unnecessary had the statute alone been invoked, and the prayer is "that the Hudson County Water Company, "pursuant to the provisions of the act entitled, etc., approved May 11, "1905, *and otherwise*, may be enjoined from carrying or transporting "any of the waters of the Passaic River into Staten Island or elsewhere out of the State of New Jersey," with a further prayer for general relief.

The act in question (P. L. 1905, p. 461,) reads as follows:

"An Act to preserve and maintain the lakes, ponds, brooks, "creeks, rivers and streams of this state, and to prevent the waters "thereof from being carried by pipes, conduits, ditches or canals "into other states, for use therein, and to authorize the court of "chancery to assist in the observance of this act.

"Whereas, The available waters of the fresh water lakes, ponds, "brooks, creeks, rivers and streams of this state do not increase with

"the growth of population, and unless the same are carefully pre-
"served, will become inadequate to perform the functions they were
"by nature designed to do, which functions are essential to the
"health and prosperity of all the citizens of this state; therefore,

"Be it enacted by the Senate and General Assembly of the State
"of New Jersey:

"1. It shall be unlawful for any person or corporation to trans-
"port or carry, through pipes, conduits, ditches or canals, the waters
"of any fresh water lake, pond, brook, creek, river or stream of this
"state into any other state, for use therein.

"2. It shall be the duty of the state geologist to keep a general
"oversight over the fresh water lakes, ponds, brooks, creeks, rivers
"and streams of this state, and to see that the same are pre-
73 "served for the use and benefit of the citizens and inhabi-
"tants of this state, and to prevent the waters thereof from
"being carried or transported by pipes, conduits, ditches or canals
"into other states for use therein; upon its being brought to his
"knowledge that it is the intention of any person or corporation to
"so carry or transport into any other state for use therein, the waters
"of any such fresh water pond, lake, brook, creek, river or stream
"of this state, it shall be his duty, through the attorney general, to
"apply to the court of chancery for injunction to restrain the same,
"and the court of chancery is hereby authorized and empowered to
"entertain jurisdiction of a suit in equity to preserve the waters
"aforesaid for the use and benefit of the citizens and inhabitants of
"this state, and to prevent their being, by pipes, conduits, ditches or
"canals, carried or transported to other states for use therein; and
"to that end to issue such restraining order or injunction, both
"preliminary and final, as may be necessary, and to enforce the same
"in the same manner it is empowered to enforce other injunctions
"or orders.

"3. This act shall take effect immediately.

"Approved May 11, 1905."

In the printed brief for the appellant a point was raised which, although abandoned upon the oral argument, deserves mention. It is rested upon the alleged fact that the water in question is not diverted from the Passaic River by the defendant, nor even by the New York and New Jersey Water Company; it being insisted, first that the latter two companies are necessary parties defendant, and, secondly, that since the East Jersey Company is permitted to divert the water for purposes of sale, the water diverted becomes an article of commerce, traffic in which between the State of New Jersey and the State of New York cannot be constitutionally prohibited by this state. The question of inter-state commerce will be dealt with hereafter.

74 With respect to the first suggestion, we do not consider the East Jersey Water Company, and the New York and New Jersey Water Company or either of them, necessary parties to this proceeding, whose object is to restrain the transportation of fresh water from the Passaic River by means of pipes and conduits to any point or points outside of the state. The actual situation dis-

closed in this, that an intake exists at Little Falls, at which certain water mains are filled, and these mains extend continuously from that point to some point or points in the City of Bayonne at or near the state line. At their terminus in Bayonne the pipes are under the control of the present appellant, which may either open them or keep them closed, at its option, unless restrained by injunction. It purposes to continue these mains to and into Staten Island, and to use them there for furnishing water to divers large consumers. If this be permitted, the water that is thus dealt out by the appellant to consumers in Staten Island will flow in a continuous stream from the Passaic River at the Little Falls intake; and while, for a part of the intervening distance, this water will be indistinguishably commingled with waters that are destined for distribution to other consumers along the line of the mains, it is manifest that if the defendant desists from constructing or using its main to Staten Island, the outflow from the river at Little Falls will be diminished by the precise quantity that otherwise would go to Staten Island. In effect, the water that defendant proposes to supply to Staten Island would be diverted from the Passaic River by defendant; without its intervention this water would continue to flow in the river. No injunction nor any other relief is needed against the two companies who are owners, respectively, of the intake and of the mains above Bayonne, and therefore these companies are not necessary parties to the present proceeding.

Coming, therefore, to the merits; it is important to keep it clearly in mind that if the defendant carries out the project that it
75 has in contemplation, a considerable part of the fresh and potable waters of the river Passaic will be diverted out of the river at Little Falls and conducted thence in a continuous artificial channel or channels to some point outside of the state of New Jersey, and will there be permitted (subject to defendant's control) to escape and flow forth, to the benefit of citizens of the State of New York, and to the incidental profit of the defendant.

The questions are whether such an artificial and extra-territorial outlet can be prevented by the people of the state of New Jersey, with or without an act of the legislature; and if an act be needed for the purpose, whether the act of 1905 is a constitutional piece of legislation.

It must, we think, be sufficiently obvious that the government established in this state by and for the people thereof has complete dominion (subject only to constitutional limitations) over all things within the borders of the state, including all lands and waters, and the mode of acquiring and disposing of rights of property therein. The fresh water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of this territory, upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government. The act of legislation above quoted has for its avowed object the preservation of our fresh water lakes, ponds, rivers

and streams, for the use and benefit of the citizens and inhabitants of this state. Aside from the immediate importance of the diversion in a given case, the act aims to prevent at the outset any extra-
76 territorial diversion that, if permitted, might give rise to a claim of vested rights.

It is insisted the act in question is unconstitutional, first, as contravening the first section of the Bill of Rights contained in our state constitution, which declares that all men have certain natural and unalienable rights, among which are those of acquiring, possessing, and protecting property, etc. In our view, however; this clause does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law; nor the right of disposing of property that has not been duly acquired under the law of the land. It is argued that while the act does not prohibit the owner of water from selling it to another person or corporation within this state, it absolutely prohibits him from selling it to any person or corporation without the state, to be used without the state. The answer is, that the act, properly construed in subordination to the constitution, does not prohibit the owner of water from selling it where he will; what it prohibits is the acquisition of ownership in flowing waters for the purpose of transporting them out of the state.

Secondly, it is objected that the act contravenes the Fourteenth Amendment of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty or property without due process of law. To this the like answer may be made.

Thirdly, the appellant cites Art. IV, sec. 2 of the Federal Constitution, that "The Citizens of each state shall be entitled to all privi-
" leges and immunities of citizens in the several states."

It may be a sufficient answer to this to say that the appellant is a citizen of this state, and cannot be heard to plead the privilege of a citizen of any other state. But, besides, it is clear that the statute does not discriminate between citizens of different states; its
77 prohibition is aimed at all persons, whether citizens of this state or of any other state, who may presume to do the prohibition act. Certainly it is not within the intendment of the constitutional clause that citizens of the State of New York, while resident there, shall have all the privileges that they would enjoy of resident within our borders.

Fourthly, the principal constitutional argument is rested upon that clause of the Federal Constitution (Art. I, sec. 8,) which empowers congress to regulate commerce among the several states. If the water whose transportation is prohibited, including the water of the Passaic River, of which the appellant seeks to make merchandise beyond our territorial borders, is the proper subject of interstate commerce, the state, of course, cannot interfere with the proposed traffic.

Such right as the appellant claims to withdraw the water from the Passaic River and make merchandise of it is derived by grant from the East Jersey Water Company. Whatever rights this company may have as against the state must rest either upon its chartered

powers, upon its status as a riparian owner upon the Passaic River, or upon both of these combined.

The charter of the East Jersey Company has not been introduced in evidence. It appears to have been admitted upon the hearing below that in fact the company was incorporated under "An act concerning corporations," approved April 7, 1875, and its supplements and amendments, (Gen. Stat. p. 907, etc.) Respecting the date of its incorporation the record is silent, but we must infer that it was prior to July 12, 1895, for a contract is in evidence made by the East Jersey Company on that day. Concerning the powers of the company we know nothing excet that in fact it is engaged in the sale of water from the Passaic River to municipal corporations, and to
78 water companies engaged in the supply of water to municipal corporations and other consumers within the State of New Jersey. We assume, therefore, that it possesses the amplest corporate powers in respect of the diversion and sale of water that could be acquired by any company organized under the general corporation act of 1875 and its supplements and amendments at any time prior to July 12, 1895.

Section 10 of the Corporation Act of 1875 as originally enacted (Rev. 1877, p. 179,) made it lawful for any three or more persons to organize "a company to carry on any kind of manufacturing, mining, "chemical, trading or agricultural business, the transportation of "goods, merchandise or passengers upon land or water, inland navi- "gation, the building *or* houses, vessels, wharves or docks, or other "mechanical business, the reclamation and improvement of sub- "merged lands, the improvement and sale of lands, the making, pur- "chasing and selling of manufactured articles, and also of acquiring "and disposing of rights to make and use the same, the renting of "buildings and steam or other power therewith, the cutting and "digging peat, stone, marl, sand or other like substance and dealing "in the same, manufactured or unmanufactured, or any wholesale "or retail mercantile business, or any lawful business or purpose "whatever, * * * Provided that nothing herein contained shall "be construed to authorize the formation of any railroad company, "turnpike company, or any other company which shall need to "possess the right of taking and condemning lands, nor of any in- "surance company, banking company, savings bank, or other cor- "poration intended to derive profit from the loan or use of money."

By P. L. 1876, p. 103, (Rev. 1877, p. 1282, pl. 4,) this section was amended by inserting among the authorized objects the following: "The damming of rivers and streams, including the storage, trans- "portation and sale of water, and water power and privileges,
79 "with the right to take rivulets, raceways and lands, and erect "and maintain dams, reservoirs, race-ways, mills, manufac- "tories and other erections, and lease, mortgage, sell and convey the "same or any part thereof"; and the proviso was amended by inserting, in the clause that excluded companies which shall need to possess the right of taking and condemning lands, the words "except for the "damming of rivers and streams and for purposes pertaining thereto, "as hereinbefore specified." A further proviso was added as follows:

"That this act shall not apply to any river or stream of a less width "and volume of water than the Delarware River, ordinarily, at "Phillipsburg in this state, below its junction with the Lehigh, nor "to any river or stream below the head of tide water in the same." The same supplement empowered companies established for the purpose of damming rivers and streams to construct, erect and maintain dams on rivers and streams of the width before mentioned not exceeding ten feet in height above low water, and to establish race-ways and other works for the purpose of creating and using the water or water power for manufacturing purposes, provided the water so diverted should be returned again to the rivers and streams after being used. Powers of condemnation were likewise conferred; whether constitutionally or not is of no present consequence.

By supplement of March 3, 1880, (P. L. 1880, p. 92; Supp. Rev. of 1886, p. 159, pl. 48,) and by supplement of February 29, 1888, (P. L. 1888, p. 112, Gen. Stat. p. 946, pl. 189,) Section 10 of the corporation act of 1875 was further amended, but not so as to enlarge the power of erecting and maintaining dams, etc.

Upon the whole, therefore, we may assume that the East Jersey Water Company is endowed with corporate power to dam rivers and streams, and to store, transport and sell water, subject to the
80 limitations contained in the act just cited. But we cannot assume (understanding the fact to be otherwise) that the Passaic River at Little Falls is of a width and volume as great as those of the Delaware River at Phillipsburg.

It appears, by admission of parties made upon the hearing below, that the defendant and appellant was incorporated under and pursuant to "An act concerning corporations (Revision of 1896, P. L. p. 277). The sixth section of this act enumerates the objects for which corporations may be formed thereunder. The power of damming streams and storing and selling water as conferred by the supplements to the act of 1875 are eliminated from the act of 1896, and in a proviso to section 6 it is declared that nothing in this act shall authorize the formation of any insurance, safe deposit or trust company, banking corporation, savings bank or other corporation intended to derive profit from the loan and use of money, or of any railroad company (except companies formed for the purpose of constructing and operating railroads in other states and territories or in foreign *companies,*) or any turnpike company or other company which shall need to possess the right to take and condemn lands. By section 118 (P. L. 1896, p. 317,) the corporation act of 1875 and all acts amendatory thereof and supplementary thereto are repealed, with a saving of the corporate powers acquired and rights vested under the acts thus repealed.

By supplement of March 24, 1899, (P. L. 1899, p. 473,) section 6 of the corporation act of 1896 was amended, but without including any authorization for the organization of companies for the purpose of diverting water from streams and storing and selling the water thus derived.

Notwithstanding such water companies are not within the express prohibition of the proviso to section 6 of the act of 1896, either as

originally enacted or as amended in 1899, it seems reasonably
81 clear that it was not the legislative intent that the incorporation of such companies was to be permitted under those acts. The exclusion of the express authorization of such companies that resulted from the repealer of the act of 1875 and its supplements, and the express exclusion, in the act of 1896, of companies needing to possess the right to condemn lands in this state, are circumstances that point in this direction. The appellant's charter, therefore, confers no power to divert water from streams, and to sell the same, beyond the mere power to engaged in "any lawful business."

If we were to assume, however, that the East Jersey Water Company, by obtaining a charter under the general corporation act of 1875 and its supplements for the purpose of damming streams and of storing and selling water within the purview of the amendments of that act, acquired not merely the corporate capacity to do those things, but the consent of the state that they might be done to the depletion of the natural flow of the stream, so far as the state, either in its sovereign capacity or as riparian owner of the lands covered by the tidal flow of the stream at its outlet, had the power to grant such consent, and were to assume that the consent could apply to the Passaic River at Little Falls, still it seems to us that such consent could not, by any fair intendment be deemed to authorize the depletion of our streams for the purpose of conveying water beyond the borders of this state. The act should be construed in view of the then existing circumstances, usages and practices. The transportation of water from this state to any other state was at that time unknown, save as it might be carried in bottles or other closed receptacles. It cannot be deemed that the legislature intended to confer, upon any persons who desired to embark the necessary capital for the purpose, the privilege of establishing an inter-state aqueduct, and although the act authorizes the storage and sale of water, this, by reasonable interpretation, must be held to limit the distribution
82 of water by pipes and acqueducts to such as is designed for the supply of the inhabitants of this state.

But could the license be deemed to have a broader scope, it was nevertheless revocable until acted upon. By the constitution of the state, as amended in 1875, Art. IV, Sec. VII, pl. 11, corporate powers were required to be conferred by general laws, subject to repeal or alteration at the will of the legislature. And by the general corporation act of 1875 itself (which antedated the final adoption of the constitutional amendments,) it is in section 6 provided (Rev. 1877, p. 178; Gen. Stat. p. 911,) that the charter of every corporation thereafter granted by or created under any act of the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature. As already pointed out, the repealer of the general corporation act of 1875 that was embodied in section 118 of the revised corporation act of 1896 (P. L. 1896, p. 317,) saved all the powers of existing corporations and preserved their vested rights. There is nothing to indicate that up to this time the East Jersey Water Company had entered into the business of transporting water outside of the State of New Jersey. Whether so or not, it is clear

that the act of 1905 now under consideration by its necessary effect operated at least as a repealer of the corporate capacity to embark in any new enterprise of that kind, even if such capacity was or could be gained by a charter under the general act of 1875. And since that charter was, by the express terms of the act, repealable, no right or license that arises solely out of its terms, and that has not been acted upon, can be deemed to be beyond revocation by the legislature. Pearsall *vs.* Great Northern Railway, 161 U. S. 646; Galveston, etc., Railway *vs.* Texas, 170 U. S. 226.

Upon the whole, therefore, it is clear that the alleged right of the appellant to transport waters outside of the state cannot be
83 rested upon any chartered powers derived by the East Jersey Water Company under the general corporation act of 1875 and its supplements.

Is the case for the appellant bettered by the circumstance that the East Jersey Water Company is a riparian owner upon the Passaic River? Since that company owns the intake at Little Falls, we may assume that it is a riparian owner. But it is not claimed, and the case shows no ground for the claim that as such owner it has any property right in the flow *or* water of the river other than such as pertains to any other riparian owner similarly circumstanced elsewhere in the state. If we assume that it has acquired the rights of all riparian owners from the intake to the tide, still, what are the nature and extent of those rights?

In the consideration of this question, as it bears upon the case before us, it is important to keep in mind that we are dealing now only with water as it stands or flows in lakes, ponds, rivers or other streams that have a natural outlet to the sea. Such water in its natural state (so far as respects private ownership thereof) is not personal but real property, being as much a part of the land itself as the soil and rocks. In this aspect it is viewed by the common law, which holds that he who owns the soil owns all above it and all beneath it. But in view of the transient and flowing nature of water, the land owner's property therein is not absolute but qualified. In a sense he owns it while it is upon his land, but his ownership is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to a riparian owner, such as the supply of his domestic needs, the watering of his cattle, the irrigation of his fileds, the supplying of power to his mill, and the like. This right of user is limited to so much as shall be reasonably necessary, and is qualified by the obliga-
84 tion to leave the stream otherwise undiminished in quantity and unimpaired in quality. The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others.

By the common law of England the right of diversion appears to have been confined to lands of the riparian proprietor, extending a reasonable distance from the bed of the stream. In some of the states of the Union, where large portions of territory are arid and

not capable of raising crops or sustaining a population without artificial irrigation, this rule has been much relaxed, but not so as to extend irrigation beyond the limits of the water shed that is naturally drained by the stream. Chauvet *vs.* Hill, 93 Cal. 407, 410; Bathgate *vs.* Irvine, 126 Cal. 423; Southern California Investment Co. *vs.* Wilshire, 144 Cal. 68; Clark *vs.* Allaman (Kansas), 80 Pac. Rep. 571, 585.

It will thus be seen that riparian owners, as such, have not any such right in or ownership of the waters that flow upon or past their lands as will entitle them to divert a portion of the flow and convey elsewhere for the use of others than riparian owners. It is indeed often said that a riparian owner may grant to others the right to a portion of the flow, provided he do not infringe upon the rights of other riparian owners thereby. But in strictness no more is meant by this than that if such grant be made the grantor and his successors in title can no longer complain of such diversion Stockport Waterworks Co. *vs.* Potter, 3 H. & C. 300; Ormerod *vs.* Todmorden Mill Co., L. R. 11 Q. B. Div. 155. See, also Doremus *vs.* City of Paterson, 20 Dick. 711.

If the East Jersey Water Company, as riparian owner, had that kind of ownership of the water itself which would give it the right to make merchandise of 10,000,000 gallons per day, it might of course do the same with entire flow of the river. If one
35 riparian owner had a right to do this, the like right must pertain to each other riparian owner, as well those above as those below the works at Little Falls; and this is of course a manifest absurdity. Nor can the riparian owner who first takes be given a better right than the others, without establishing the rule of "prior appropriation." Such a rule was established by act of congress of July 26, 1866, with respect to certain lands in the mining states of the west, for reasons explained in Jannison *vs.* Kirk, 98 U. S. 453. Any such rule is foreign to the common law, whose maxim is *Aqua currit, et currere debet, ut currebat.*

We are referred to the language of Mr. Justice Depue, (afterwards Chief Justice) speaking for the Supreme Court in Cobb *vs.* Davenport, 3 Vr. 369, at p. 378, where he said: "By the common law all "waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter in the "individual proprietor. The title of the sovereign being in trust "for the benefit of the public—the use, which includes the right "of fishing and of navigation, is common. The title of the indi- "vidual, being personal in him, is exclusive—subject only to a servi- "tude in the public for purposes of navigation if the waters are "navigable in fact." Upon the strength of this it is contended by counsel for the appellant that it was intended to be held by the Supreme Court that the title of the individual riparian owner to the water itself—the fluid considered as a commodity—is exclusive against the public and against all persons other than his co-riparian owners. An examination of the context, however, shows that nothing of the sort was intended. The question at issue was whether the land covered by Green Pond, an inland lake having a navigable

depth but no navigable outlet, and entirely remote from the flow of the tide, was in the plaintiff who claimed title thereto under grants from the board of proprietors, or whether it was in the pub-
86 lic, so that the plaintiff could not exclude the defendant from fishing upon the lake. What was meant by the language quoted is that in *lands covered by private waters* (and the case properly applied the tidal test as distinguishing public from private waters), exclusive title was originally in the boards of proprietors and could be derived by them to individuals.

That the interest of the riparian owner in the water is confined to the usufruct, is clearly set forth in Higgins *vs.* Flemington Water Co., 9 Stew. 538.

Excluding, therefore, all the customary and lawful uses by means of which a riparian owner may properly diminish the flow of a stream, what private ownership remains in the residue? His right of ownership, manifestly, is the right simply to have the flow continue; a valuable right, truly, but a right that partakes solely of the nature of realty, being from the nature of things inseparably annexed to the land itself.

We may concede, for the purposes of the present discussion, that a land-holder may acquire an absolute private title to water, as water, by employing artificial means to intercept it as it falls in rain from the clouds; thus preventing it from reaching the natural streams. (See dissenting opinion of Field, J., in Spring Valley Water Works *vs.* Schlottler. 110 U. S. 373). We may concede, also, for present purposes, that subterranean waters, such as may be reached only by driving wells, when thus acquired become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that if they be thus converted into a merchantable commodity the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and natural gas, concerning the latter of which it was held by the Supreme Court of Indiana in State, *ex rel.* Corwin *vs.* Indiana
87 & Ohio Oil etc. Co. 120 Ind. 575, that the state could not constitutionally prohibit its transportation beyond the confines of the state.

The act of 1905 deals only with fresh water running in the natural streams, and in lakes and ponds that have their outlets in natural streams. The decree under review, likewise, deals alone with water of this character. The common law recognizes no right of private ownership therein except to a limited extent by the riparian owners.

And since the exercise of all rights of private ownership, by all riparian owners, still leaves the stream to remain as a running stream, there remains a residuum of common or public ownership that under our system rests in the state as a trustee for all the people. Blackstone says: "Water is a movable wandering thing, and must of ne-
"cessity continue common by the law of nature; so that I can have
"only a temporary, transient, usufructuary property therein." 1 Black. Com. 18. And in Cobb *vs.* Davenport, 3 Vr. at p. 378, Depue, J. said: "The policy of the common law is to assign to everything

"capable of ownership a certain and determinate owner. * * * "If capable of occupancy, and susceptible of private ownership and "enjoyment, the common law makes it exclusively the subject of "private ownership; but if such private ownership and enjoyment "are inconsistent with the nature of the property, the title is in the "sovereign, as trustee for the public, holding it for common use and "benefit." What the learned justice proceeded to say, to the effect that in this state non-tidal waters are private, not public, had reference, as already shown, to the right of fishing, and was not intended to assert a complete private ownership in the water as water.

Such private title as may be acquired in water, the liquid, when separated from its natural bed, may for convenience be de-
88 scribed as a title by occupancy; and the question remains, how far does the law authorize the acquisition of such a title. As already shown, the common law authorizes its acquisition only by riparian owners, and for purposes narrowly limited. Beyond that the ownership is common and public.

The present case is closely parallel to Geer *vs.* Connecticut 161 U. S. 519, where the Supreme Court of the United States held that a state law prohibited game killed within the state from being transported beyond its borders, did no violence to the inter-state commerce clause of the federal constitution; the decision being put upon the ground that by the common law wild game is subject to governmental control; that the state might exercise its control in such manner as to confine the use of it to the people of that state; that although the statute under consideration permitted the killing of game, and its sale within the state, yet the prohibition against exportation entered into every such transaction of sale, and rendered it strictly internal commerce; that the state in granting to its residents the right to kill game, had lawful authority to impose a condition prohibiting its exportation; and that in the face of such a prohibition the game killed did not become the subject of interstate commerce. Upon the argument here an attempt was made to distinguish this decision upon the ground that it turned upon the ownership of game by the state as successor to the King's prerogative. An examination of Justice White's opinion, however, shows that he based the King's prerogative and the state's right of control, alike, upon the fact that game was public property because not susceptible of absolute private ownership by anybody. Hence is derived the doctrine that control resides in the state, not as a proprietor, but in its sovereign capacity as representative and for the benefit of all the people in common. Water, the liquid, in its natural state,
89 is as fugitive in character as game, and as little susceptible to private ownership.

And so the riparian owner, as such, has no common-law right to make merchandise of the water that otherwise would naturally flow to the sea.

But it is argued, in effect, that in this state we have by statute departed from the common law in this regard, and have authorized riparian owners and others to make general merchandise of the water of our lakes and streams. No doubt if such were the general policy

of our statute-law, it would not be competent for the legislature to prohibit the exportation of such merchandise beyond the state. But no statute to this effect is cited, and we know of none.

From the organization of the state government until the constitutional amendments of 1875 which prohibited special laws for the purpose, many special charters were granted by the legislature conferring corporate powers that included the right to divert and use the waters of lakes, ponds, and streams for purposes of power, for purposes of artificial navigation and for the purpose of supplying cities and towns of the state with water for consumption. In most, although not in all, of these special charters, there was no grant of the right to interfere with the natural course of the water other than such as may be implied from the grant of corporate powers that could not be exercised without the diversion of water from its natural courses and the expenditure of money by the corporators in the development of the various enterprises thus chartered. In a few cases the grants of water rights were more explicit, as witness the charter of the Society for the Establishment of Useful Manufacturers, passed November 22, 1791, (P. L. p. 730, sec. 17); the Act to develop and improve the water power of the Passaic River, approved March 30, 1868, (P. L. p. 545, sec. 1, etc.), which confers further powers
90 upon the same society; the charter of the Morris Canal & Banking Company, passed December 31, 1824, (P. L. p. 158, secs. 5, 11, etc.;) the charter of the Delaware & Raritan Canal Company, passed in 1830, (P. L. p. 75, sec. 11).

Shortly after the constitutional amendments of 1875 the legislature passed two general laws, one for the organization of private corporations for the purpose of supplying municipalities with water, (P. L. 1876, p. 318; Rev. 1877, p. 1365; Gen. Stat. p. 2199,) and the other authorizing cities to establish works of their own, (P. L. 1876, p. 366; Rev. 1877, p. 720; Gen. Stat. p. 646). Since then, numerous other general acts have been passed, looking to the supply of our various municipalities with water. Reference has already been made to the several supplements to the corporation act of 1875 that dealt with the damming of the streams and the storage and sale of water. These supplements have been repealed (P. L. 1896, p. 317, sec. 118).

Conceding all that may reasonably be claimed to be the effect of these various enactments, and others of like character, they do not evince any legislative policy to make the waters of our lakes and streams the subject of general merchandise, nor indeed of merchandise at all in any proper sense. The water that is diverted from a stream into an artificial canal for navigation does not become the subject of commerce. Water that is withdrawn for power purposes returns shortly to the natural bed. That which is withdrawn for the supply of municipalities shortly re-enters the common stock of the state. In a limited sense it may become for a time personal property, and to a limited extent be made the subject of barter and sale, but only for public purposes pertaining to the welfare of our own citizens, who by the very fact of residence within our

borders have a prior claim upon such natural advantages as
91 pertain to our territory. Any grant of the power of eminent domain is by the constitution limited to public uses, and the withdrawal of water from a stream in order to make general merchandise of it could hardly be deemed a public use. All our legislative grants (express or implied) of the right to divert water, for other than the common-law riparian uses, have been contained in corporate charters, general or special. The special charters are all by fair intendment confined to purposes that are of necessity limited to the territory of this state. The broadest charter for purposes of water diversion that could at any time be acquired under our general laws, is such an one as we have above assumed to be possessed by the East Jersey Water Company. Its utmost scope, and its limitations, have already been indicated.

There is, in all of this legislation, no general purpose, much less any specific enactment, that changes the rule of the common law so as to make the water of our streams and lakes the subject-matter of commerce in the ordinary sense. Nor was anything of this kind intended to be intimated in New Jersey Suburban Water Company *vs.* Harrison, 43 Vr. 194, 195, where it was said: "There was evi-
" dence that the water in question had become a commodity, and
" had been bought and paid for by the water company." This water had been acquired from the East Jersey Water Company for the supply of one of the municipalities in this state. It was, at the most, converted into personal property for that limited purpose; but, while in the distributing pipes was not the subject of commerce in the general sense.

It is suggested that where the legislature authorizes a municipality or a water company to sell and dispose of water to private consumers, the consumer may put the water into bottles or other receptacles and sell it abroad in the market. For present purposes this may be fully conceded; and we may assume, (without conceding,) that the
92 State may not limit commerce in the bottled water to its own citizens. The statute under review imposes no such limitation; its prohibition being confined to the transportation of water without the state by means of pipes, canal- and the like. Whether the legislature, while authorizing the diversion of water from the streams for municipal purposes, might not at the same time entirely prohibit its being bottled for sale, is quite a different question, concerning which no intimation is intended.

It is said that neither the act of May 11, 1905, nor the information of the Attorney General, seeks to prevent the diversion of water from the streams, but only its transportation into another state for use therein. A sufficient answer to this is that the legislature may well have confined its prohibition to that which required to be prohibited; and that the information of the Attorney General is exhibited to prevent a specific infraction of the law, and need not concern itself with other matters.

Implicit in the argument, however, is the suggestion that the absence of statutory prohibition against the diversion of river waters, saving where the water is intended for transportation out of the state,

amounts to a legislative recognition of the right of riparian owners, and perhaps of others, to divert water from the streams at their will so long as it is disposed of within the state. To this argument we cannot yield our assent. The prohibition of artificial channels to lead our fresh waters out of the state does not at all imply a general license to divert waters provided they be used within the state. As we have just pointed out, it is, and long has been, the legislative policy of this state, while recognizing fully the common law right of diversion on the part of riparian owners, to allow no statutory extension of this right, nor to authorize water diversion for other than riparian uses, saving for a limited class of purposes beneficial to the people of this state, such as the establishment of water powers
93 for manufacturing purposes, the construction of artificial channels for navigation, and the supply of our own inhabitants with water through aqueducts.

So far from sanctioning any general commerce in water, our legislative policy has been and is to preserve and administer our water rights for the benefit of our own people, to whom by right of proximity and sovereignty they naturally belong. A recent instance is to be found in P. L. 1905, p. 200, sec. 3, whereby the power of the flood commissioners to be appointed under P. L. 1904, p. 518, is limited so that they shall have no power to sell or divert water beyond the state limits.

Throughout the whole of the argument for the appellant it is suggested, rather than distinctly urged, that the people of the neighboring state of New York have a natural right to use the water of New Jersey if such use can be gained without impairing the rights of individual riparian owners upon our streams. It is said that the appellant purposes to take only the surplus water of the Passaic that is of no particular benefit to any one while running in a natural state, and the impression is sought to be conveyed that the people of New Jersey have no lawful power to interfere with what is called the natural right of the people of New York to gain a water supply from this source. Counsel, indeed, assails the act of 1905 as "a most un-"reasonable and unneighborly piece of legislation, highly discredit-"able to the state." Such epithets are of no service in a judicial tribunal. If the act under consideration be impolitic, arguments to that effect may well be addressed to the law-making body, but are out of place here.

Whether the proposed diversion of the appellant is material in quantity is a question that may receive consideration in its proper order. At this point we are concerned particularly in denying that the State of New York, or the citizens thereof, have any inherent right to withdraw a supply of water from the territory of New
94 Jersey by artificial means.

In this aspect the case for the appellant can stand certainly on no higher ground than the people of New York themselves would occupy if in their sovereign capacity they were asserting similar rights in the courts. Stripped of all circumlocution, what is asserted is the right of the people of New York to derive an artificial water supply from the territory of New Jersey without the consent of the

people of this state. This argument, however, is at once overthrown by reference to the established principle that one state cannot expropriate for its public purposes property within the territory of another state. Randolph on Eminent Domain, sec. 28, citing Crosby *vs.* Hanover, 36 N. H. 404, 423; State *vs.* Boston, Concord & Montreal R. R. Co., 25 Vr. 433, 444; Saunders *vs.* Blufield Water Works Co., 58 Fed. Rep. 133, 136. See also 10 Am. Eng. Encyc. Law, (2nd ed.) 1051; Holyoke Water Power Co. *vs.* Connecticut River Co., 52 Conn. 570, 575.

To admit that the people of the State of New York have any inherent right to gain a water supply from the lakes or streams of New Jersey by means of an artificial aqueduct constructed for the purpose, is to assert that the sovereignty of New York extends to some extent and for some purposes over the soil of New Jersey. To state the proposition is to refute it. Such interstate rights can be acquired only by inter-state compact.

We have been privileged to see in print an opinion recently submitted to the Merchants' Association of New York by Mr. Randolph, author of the well-known work on Eminent Domain, upon the question of an inter-state water supply for that city. Referring to "that "interest in water which each state possesses as the guardian of its "community," he says: "I think it is clear that the right of an
95 "individual or a corporation to divert water, whether gained "by public grant or by prior appropriation, is presumed to be "utilized within the state, which may forbid the carriage of the water "beyond its bo-nds." Again, he uses this language: "And when we "point out that each state holds all the property in its territory free "from the eminent domain of another, and cannot be compelled to "surrender its property to another in any way, I think we approxi-"mate the irreducible measure of sovereignty in this relation."

It will of course be observed that the case before us is not at all parallel to the case that would be presented were the State of New Jersey, or citizens thereof, setting up a right to interfere with a flow of water that otherwise would, in its natural course, reach the territory of a neighboring state. Such a case was presented in New York City *vs.* Pine, 185 U. S. 93. There the city of New York constructed a dam on the west branch of Byram River within the state of New York; this being a non-navigable stream of fresh water arising in New York, flowing thence through the State of Connecticut, and emptying into Long Island Sound. The plaintiffs were riparian owners of land in the State of Connecticut, and brought action in the Federal Circuit Court for an injunction to restrain the city from diverting the waters of the west branch from their natural flow through the plaintiff's lands. The Supreme Court assumed, without deciding, that although the west branch above the dam and all the sources of supply of water to that branch are within the limits of the State of New York, that state has no power to appropriate such water or prevent its natural flow through its customary channel into the State of Connecticut. The injunction was denied, however, and the right of the plaintiffs to pecuniary compensation established in its stead, on the ground of their acquiescence in the construction of the

works by means of which the diversion was to be effected.
96 In the great case of Kansas *vs.* Colorado, 185 U. S. 125, (decided on demurrer, but not yet determined on final hearing,) the State of Kansas, partly on the basis of its ownership of riparian lands upon the Arkansas River, and partly in the right of its citizens who are riparian owners thereon, is seeking to enjoin the State of Colorado from withdrawing from the river for irrigation of the arid lands of Colorado so much of the waters of the river as to materially injure the riparian lands in Kansas. A demurrer to the bill was overruled on the ground that in a case of so great importance a determination of the questions involved ought to be left until the facts were established by proofs. Impliedly the right to prevent an undue interference with the natural flow of the river was recognized.

But whatever recognition these two important decisions imply of the right of one state to prevent another state from interfering with the natural flow of a river in which the complaining state has an interest, is directly opposed to the contention of the appellant here; for what it is asserting, in effect, is the right of citizens of the state of New York to interfere with the natural flow of one of the rivers of New Jersey, without the consent and contrary to the express prohibition of the people of the latter state.

In our opinion, therefore, the legislature may prohibit the abstraction from the lakes, ponds and streams of the state of waters to be used for any other purpose than to meet the lawful uses of riparian owners; (saving, of course, other rights vested under grants already made;) and when the legislature has forbidden its abstraction for a stated purpose not within such uses, abstraction for that purpose becomes unlawful and may be restrained at the instance of the Attorney General.

The act of 1905 forbids its abstraction by canals or conduits
97 for transportation beyond the state. This is not in violation of the interstate commerce clause of the Federal Constitution, because until the water is lawfully abstracted it does not become the subject of legitimate commerce. Ames *vs.* Kirby, 42 Vr. 442. The state having power to prohibit the diversion of the water from the lakes and streams for transportation beyond the state, the prohibition is a condition imposed upon its diversion, and so the water diverted cannot legitimately enter into interstate commerce. Geer *vs.* Connecticut, 161 U. S. 519, 530.

The act of 1905 is thus vindicated as a legitimate exercise of the sovereignty of this state, not interfering with private property rights, with the rights of citizens of the other states, nor with interstate commerce.

It must not be forgotten, however, that the state of New Jersey is itself a riparian owner upon the Passaic River below the intake of the East Jersey Water Company. The state owns the bed of the stream where flowed by the tide, saving so far as it may have made grants to private owners. The state therefore has a proprietary right to the continued flow of the stream which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership. For this additional

reason the state in its sovereign capacity may prohibit any extraordinary diversion such as would be occasioned by withdrawing water from the river by means of artificial canals or pipes for the purpose of conducting it out of the state.

It is no answer to say that the abstraction of the entire flow of the Passaic would not lower the *level* of the water that covers the state's land, which, as asserted, is governed by the level of the sea. The assertion is not accurate, for of course the downward flow of the river combines with the flow of the tide to determine the water-level at the mouth of the river and for a long distance above its mouth. But, aside from this question, the state as riparian
98 owner is interested in the *quality* of the water that flows upon its land.

In the face of an express statutory prohibition, resort cannot be had to the maxim *de minimis*. It is for the law-making power to determine whether the amount of water proposed to be abstracted is so slight that it ought to be disregarded; and it is within the competency of the legislature to determine as they have done in this act, that the diversion shall be absolutely prohibited.

A similar question was presented in State Board of Health *vs.* Diamond Mills Paper Co., 18 Dick. 111, affirmed 19 Dick. 793. There a statute prohibited the discharge of polluting material into any stream from which municipalities receive a water supply for domestic uses above their point of intake, and authorized the State Board of Health to institute an action in the Court of Chancery to enjoin the continuance of such pollution. It was contended that the pollution proved did not affect the water of the stream beyond a short distance from the point of pollution, and the proofs did not show that the water supply of any municipality was in fact polluted. But Vice Chancellor Stevens held, in effect, that in the face of the legislation the amount of pollution was immaterial. His decision was affirmed by this court for the reasons given by him.

We must not be understood, however, as intimating that the mischief at which the act of 1905 is aimed is trifling or unsubstantial, nor that the diversion proposed by the appellant is of no present practical moment. The amount proposed to be presently diverted is a material part of the dry-weather flow of the Passaic at Little Falls. Comparison between this amount and the volume of the river in times of flood are not of the slightest value. Nor can it be properly said that when the river runs obstructed to the sea its water, either in time of drough, or in time of flood, is "wasted," in
99 any general sense. It carries off polluting material (see the practical situation disclosed in Simmons *vs.* Paterson, 15 Dick. 385, and Van Cleve *vs.* Passaic Valley Sewerage Com'rs, 42 Vr. 201, etc.), it fructifies the soil, and performs the other normal functions of a fresh-water stream. The withdrawal of 3,000,000 to 10,000,000 gallons per day is not a matter that may be treated as of little consequence. If the decree under review were to be justified only by resort to the police power, and if it interfered with any property rights of the appellant, it might be necessary to show a

substantial present necessity for such interference. Such, however, is not the case.

The act of 1905 looks not only to the present, but to the future. It recognizes that the growth and prosperity of the state depend not alone upon the advantages that it presently affords, but upon the assurance that the like advantages, to the extent of our natural resources, properly conserved, will remain for posterity. This policy of foresight, and the desire to foreclose in advance any claim of a vested right to transport the waters of our lakes and streams beyond the borders of the state, doubtless entered into the motive of the legislature in imposing a present prohibition.

We find it unnecessary to discuss the grounds upon which the learned Vice Chancellor based his conclusions, aside from the act of 1905.

The decree under review should be affirmed, with costs.

"Endorsed: Filed Nov. 19, 1906. S. D. Dickinson, Clerk."

[Endorsed:] State of New Jersey, Department of State, Comparing and Certifying Division. Copy correct. Compared by J. L. Hendricks. No. 12. Original read by E. H. Weatherby. J. L. Hendricks, in charge of Division.

160 New Jersey Court of Errors and Appeals, November Term, 1905.

Between—

ROBERT H. MCCARTER, Attorney General, Informant and Respondent,

and

HUDSON WATER COMPANY, Appellant.

On Appeal from Chancery.

*Decree of Affirmance.*

This cause coming on to be heard at the November Term, one thousand nine hundred and five, and being argued by Gilbert Collins & R. V. Lindabury counsel for the appellant, and Robert H. McCarter, Attorney General counsel for the respondent, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be affirmed in all things—

It is now, on this nineteenth day of November in the year of our Lord one thousand nine hundred and six, ordered, adjudged and decreed, that the decree of the Chancellor be in all things affirmed with costs; and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court.

On motion of

ROBERT H. MCCARTER,
*Solicitor and of Counsel for Respondent.*

101 [Endorsed:] New Jersey Court of Errors and Appeals, November Term, 1905. Between Robert H. McCarter, Att'y Gen'l, Resp't, and Hudson Water Co., Appellant. On Appeal from Chancery. Decree of Affirmance. Robert H. McCarter, Sol'r. Filed Nov. 27, 1906. S. D. Dickinson, Clerk.

DEPARTMENT OF STATE.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *ex officio* Clerk of the Court of Errors and Appeals in the Last Resort in all Causes, *do hereby certify*, that the foregoing is a true copy of the decree of the said Court in the above stated cause, dated November 19, 1906, as the same is taken from and compared with the Minutes of said Court.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this Fourth day of December, A. D. 1906.

[Seal of the State of New Jersey.]

S. D. DICKINSON,
*Secretary of State.*

102 New Jersey Court of Errors and Appeals.

ROBERT H. MCCARTER, Attorney General of the State of New Jersey, Respondent,

*vs.*

THE HUDSON COUNTY WATER COMPANY, Appellant.

*Petition for Writ of Error.*

The Hudson County Water Company, the appellant in the above entitled cause, feeling aggrieved by the judgment of this Court entered on the twenty-seventh day of November, Nineteen Hundred and Six, affirming the final decree of the Court of Chancery of New Jersey herein, dated September Nineteenth, Nineteen Hundred and Five, comes now, by Collins & Corbin, its Attorneys, and shows that there was drawn in question, on the hearing of said cause, the validity of an Act of the Legislature of the State of New Jersey, approved May Eleventh, Nineteen Hundred and Five, being Chapter 238 of the Session Laws of that year, and that the validity of said Act was disputed by the Appellant on the ground that it was an attempt to regulate and to control and to forbid interstate commerce, and that it denied to citizens of other States the privileges and immunities of the citiznes of New Jersey, and the equal protection of the Laws of New Jersey, and that it is in violation of the Constitution of the United States.

And your petitioner shows that by the said decree and judgment, the said statute was sustained and enforced against the appellant.

And your petitioner shows that there was also drawn in question in said cause, the construction of certain clauses of the Constitution of the United States, and that the Appellant asserted the right and

privileges to take water from running streams in New Jersey and sell the same to citizens of New York as fully and freely as to
103 citizens of New Jersey, which right and privilege was denied by the decision of the court herein, and thereby your petitioner was denied the right and privilege of carrying on commerce between the States of New Jersey and New York, and the citizens of New York were denied the privileges and immunities of the citizens of New Jersey, and the equal protection of the laws of New Jersey.

And your petitioner prays the said Court for an order allowing your petitioner to prosecute a writ of error to the United States Supreme Court, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court shall be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

And your petitioner will ever pray.

COLLINS & CORBIN,
*Attorneys for Petitioner.*

Endorsed: "Filed Nov. 27 1906, S. D. Dickinson.

[Endorsed:] State of New Jersey Department of State Comparing and Certifying Division Copy correct Compared by J. L. Hendricks. Original Read by H. M. Dolton. J. L. Hendricks, in charge of Division.

104 New Jersey Court of Errors and Appeals.

ROBERT H. MCCARTER, Attorney General of the State of New Jersey, Respondent,
and
THE HUDSON COUNTY WATER COMPANY, Appellant.

*Assignment of Errors.*

The appellant, The Hudson County Water Company, by Collins & Corbin, its Attorneys, comes and files the following assignment of errors, upon which it will rely, and says:

That in the record and proceedings in above cause, there is manifest error in this, that the bill of complaint and the matters therein contained are not sufficient in law for the respondent to have or maintain his action aforesaid against the said appellant. And there is also error in this, that by the record aforesaid it appears that the decree herein was given in favor of the respondent and against the appellant, and that by the judgment of said Court of Errors and Appeals, the decree of the Court of Chancery was affirmed, whereby the appellant was enjoined from carrying or transporting out of the State of New Jersey any of the waters of the Passaic River, whereas

by the law of the land the said decree ought to have been reversed, and the bill of complaint ought to have been ordered to be dismissed with costs, and judgment of reversal ought to have been given for the appellant, The Hudson County Water Company, against the said Robert H. McCarter, Attorney General, being the respondent; and that there is error in this, that by the said decree and judgment, the Act of the Legislature of the State of New Jersey, approved May Eleventh, Nineteen Hundred and Five, being Chapter 238 of the Annual Session Laws of that year, is sustained and enforced against this appellant, whereas the same ought to have been held to
105 be void, because it is an attempt to regulate and to control and to forbid commerce between the State of New Jersey and other States, and because it denies to citizens of other States the equal protection of the laws of New Jersey, and the privileges and immunities of the citizens of New Jersey, and is in violation of the Constitution of the United States; and that there is error also in this, that by the said judgment and decree, the appellant was denied the right and privilege to sell water taken from a running stream in New Jersey to citizens of New York, as fully and freely as to citizens of New Jersey, in violation of the provisions of the Constitution of the United States providing for the regulation, by the Congress exclusively, of commerce between the States, and in violation of the provisions of said Constitution whereby the citizens of New York are entitled to the privileges and immunities of the citizens of New Jersey, and the equal protection of the laws of New Jersey.

And the Hudson County Water Company prays that the decree and judgment aforesaid may be reversed, annulled, and for nothing holden, and that the bill of complaint may be ordered to be dismissed, and that it may be restored to all things which it has lost by occasion of said judgment.

COLLINS & CORBIN,
*Attorneys.*

Endorsed: "Filed Nov. 27 1906 S. D. Dickinson Clerk."

[Endorsed:] 1783 State of New Jersey Department of State Comparing and Certifying Division Copy correct. Compared by J. L. Hendricks. Original Read by E. E. Fisher J. L. Hendricks, in charge of Division.

106 New Jersey Court of Errors and Appeals.

ROBERT H. MCCARTER, Attorney General of the State of New Jersey, Respondent,
*vs.*
HUDSON COUNTY WATER COMPANY, Appellant.

*Order Allowing Writ of Error.*

Upon reading and filing a petition for a Writ of Error and an Assignment of Errors, to review the judgment entered in above en-

titled cause affirming the final decree of the Court of Chancery, dated September 19, 1905,

It is ordered that a Writ of Error be and hereby is allowed, to have reviewed in the United States Supreme Court the said judgment and decree heretofore entered herein, and that the amount of bond on such Writ of Error be and hereby is fixed at Five Hundred ($500.00) Dollars.

Dated November 27th, 1906.

W. J. MAGIE,
*Presiding Judge of the New Jersey Court of Errors and Appeals.*

Endorsed: "Filed Nov. 27, 1906, S. D. Dickinson, Clerk."

[Endorsed:] State of New Jersey Department of State Comparing and Certifying Division Copy correct Compared by J. L. Hendricks, Original Read by H. M. Dolton J. L. Hendricks, in charge of Division.

107 New Jersey Court of Errors and Appeals.

Between—

ROBERT H. MCCARTER, Attorney General of the State of New Jersey, Respondent,
and
THE HUDSON COUNTY WATER COMPANY, Appellant.

*Bond.*

Know all men by these presents, that we, the Hudson County Water Company, a corporation of the State of New Jersey, as principal; and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, as surety; are held and firmly bound unto Robert H. McCarter, Attorney General of the State of New Jersey, in the full and just sum of Five Hundred Dollars ($500) to be paid to the said Robert H. McCarter, Attorney General of the State of New Jersey, his certain attorneys, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our corporate seals and dated this twenty-seventh day of November, in the year of our Lord One Thousand Nine Hundred and Six.

Whereas lately, at a session of the Court of Errors and Appeals of the State — New Jersey in a suit pending in said Court between the Hudson County Water Company, appellant, and Robert H. McCarter, Attorney General of the State of New Jersey, respondent, a final judgment or decree was rendered, affirming the decree of the Court of Chancery of New Jersey, against the said appellant, and the said Hudson County Water Company, appellant, having obtained

from said Court a writ of error to reverse the judgment or decree in the aforesaid suit, and a citation directed to said Robert H.
108 McCarter, Attorney General of the State of New Jersey, is about to be issued, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington:

Now, the condition of the above obligation is such that if the said Hudson County Water Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

HUDSON COUNTY WATER COMPANY,
By M. BEALL, *President.*

Attest:
CLARENCE F. WALKER,
[SEAL.] *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*

Attest:
JAMES R. KINGSLEY,
[SEAL.] *Attorney-in-fact.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 27th day of Nov., 1906, before me, the subscriber, a Commissioner of Deeds for the State of New Jersey, in the State of New York, duly Commissioned and sworn, personally came James R. Kingsley, who being by me duly sworn, on his oath, saith: that he is the Attorney-in-fact of the Fidelity and Deposit Company of Maryland, and that he resides in the City of New York, and that he knows Henry B. Platt of the Fidelity and Deposit Company of Maryland, and he knows too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the said James R. Kingsley, and that the said instrument signed by the said Henry B. Platt,
109 as Vice-President of the said Company, attested by the said James R. Kingsley as Attorney-in-fact by order of the Board of Directors of the said Company, in deponent's presence as a voluntary act and deed of the said Company; that the liabilities of the said Company do not exceed its assets, as ascertained in the manner provided in Chapter 103 of the Laws of 1894, of the State of New Jersey, and that the following is a true copy of a resolution of the Board of Directors of the said Fidelity and Deposit Company of Maryland, passed on the sixth day of March, 1901, at a regular and lawful meeting, to wit:

"Resolved, That Henry B. Platt, Vice-President, or George "Sewell Bonner, Attorney, or Frank H. Platt, Edward T. Platt, "Joseph A. Flynn, Hugh M. Allwood, and James R. Kingsley, "Attorneys-in-fact of this Company, in the State of New York, be, "and each of them is hereby authorized and empowered to sign,

"execute and deliver any and all bonds and undertakings for or on "behalf of this Company, and to attach thereto the seal of the cor- "poration, the same to be attested by the said George Sewell Bonner, "Attorney of the Company or by either one of the other persons "above named, as the occasion may require."

That the order of the Chancellor of the State of New Jersey, dated January eighth, A. D. eighteen hundred and ninety-four, providing for the acceptance of the said Company alone as sufficient surety in said Court, except where such is expressly forbidden by Statute, stands and remains unrevoked and in full force and effect, and the deposit made thereunder with the Clerk of the Court of Chancery of the said State remains on deposit according to the terms of said order.

JAMES R. KINGSLEY.

Sworn to and subscribed in the City of New York, in the County of New York, and State of New York, this 27th day of November, 1906, before a Commissioner of Deeds for the State of New Jersey, in the State of New York, duly commissioned and sworn.

110 J. WHITMORE BARRY,
*A Commissioner of Deeds for the State of New Jersey.*

"Approved:
W. J. MAGIE,
*Presiding Justice of the Court of Errors.*"

Endorsed: "Filed Nov 27 1906 S. D. Dickinson, Clerk."

[Endorsed:] 1783 State of New Jersey Department of State Comparing and Certifying Division Copy Correct Compared by J. L. Hendricks. Original Read by E. E. Fisher. J. L. Hendricks, In charge of Division.

111 STATE OF NEW JERSEY,
DEPARTMENT OF STATE.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *Ex Officio*, Clerk of the Court of Errors and Appeals, do hereby certify, that the original bond in the case of Robert H. McCarter, Attorney General of the State of New Jersey, Respondent, and The Hudson County Water Company, Appellant, was lodged in this office, on the twenty-seventh day of November, nineteen hundred and six.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this seventeenth day of December, A. D. 1906.

[Seal of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

112 UNITED STATES OF AMERICA, *ss:*

[Seal of the U. S. Circuit Court, Dist. of New Jersey.]

The President of the United States to the Honorable Justices of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the suit between Robert H. McCarter, Attorney General of the State of New Jersey, Complainant-Respondent, and The Hudson County Water Company, Defendant-Appellant, wherein was drawn in question the validity of a statute of said State of New Jersey, and an authority exercised under said statute, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and was against the right, title and privilege, specially set up or claimed by the appellant under the said Constitution, manifest error hath happened to the great damage of The Hudson County Water Company, Appellant, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and complete justice done to the parties aforesaid in this behalf, *do command you,* if judg-
113 ment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the Twenty-sixth day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the Twenty-seventh day of November Nineteen Hundred and Six.

H. D. OLIPHANT,
*Clerk of the Circuit Court of the United States for the District of New Jersey.*

Allowed by

W. J. MAGIE,
*Presiding Judge of the New Jersey Court of Errors and Appeals.*

114 [Endorsed:] 1783. United States Supreme Court. Robert H. McCarter, Attorney General of the State of New Jersey, Def't-in-Error, *vs.* The Hudson County Water Company, Pl'ff-in-Error. Writ of Error. Returnable, Dec. 26, 1906. Gilbert Collins, Attorney.

115 STATE OF NEW JERSEY,
DEPARTMENT OF STATE.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *Ex-Officio*, Clerk of the Court of Errors and Appeals, do hereby certify, that the original Writ of Error in the case of Robert H. McCarter, Attorney General of the State of New Jersey, Defendant in Error, *vs.* The Hudson County Water Company, Plaintiff in Error, was lodged in this office on the twenty-seventh day of November, A. D., 1906, together with a copy thereof for the Defendant in Error, Robert H. McCarter, Attorney General of the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this Seventeenth day of December, A. D. 1906.

[Seal of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

116 *Return to Writ of Error.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within-entitled cause, with all things concerning the same.

Witness my hand and the Seal of the Court of Errors and Appeals, this 20th day of December A. D. 1906.

[Seal of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert H. McCarter, Attorney General of the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date of this Writ, pursuant to a Writ of Error, filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey, wherein The Hudson County Water Company is plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the Judgment in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this Twenty-eighth day of November, A. D. Nineteen hundred and six.

[Seal of the State of New Jersey.]

W. J. MAGIE,
*Presiding Judge of New Jersey Court of Errors and Appeals.*

Attest:
S. D. DICKINSON, *Clerk.*

118 [Endorsed:] United States Supreme Court. Robert H. McCarter, Attorney General of the State of New Jersey, Defendant in Error, vs. The Hudson County Water Company, Plaintiff in Error. Citation. Gilbert Collins, Attorney.

Service of the within citation and receipt of a copy thereof is hereby acknowledged this thirtieth day of November, Nineteen hundred and six.

ROBERT H. McCARTER,
*Attorney-General of the State of New Jersey.*

Endorsed on cover: File No. 20,504. New Jersey court of errors and appeals. Term No. 184. The Hudson County Water Company, plaintiff in error, *vs.* Robert H. McCarter, Attorney-General of the State of New Jersey. Filed December 27th, 1906. File No. 20,504.

Office Supreme Court, U. S.
FILED.
MAR 2 1908
JAMES H. McKENNEY,
CLERK.

**BRIEF FOR PLAINTIFF IN ERROR.**

# Supreme Court of the United States

OCTOBER TERM, 1907.

No. 184.

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THE HUDSON COUNTY WATER COMPANY,
Plaintiff in Error,

*vs.*

ROBERT H. McCARTER, Attorney General of New Jersey, *ex rel.*, THE STATE GEOLOGIST,
Defendant in Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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GILBERT COLLINS,
Counsel for Plaintiff in Error.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

# Supreme Court of the United States.

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|---|---|
| THE HUDSON COUNTY WATER COMPANY,<br>*Plaintiff in Error.*<br>*vs.*<br>ROBERT H. MCCARTER, ATTORNEY GENERAL OF NEW JERSEY, *ex rel.*, THE STATE GEOLOGIST,<br>*Defendant in Error.* | *In Error to New Jersey Court of Errors and Appeals.* |

## Brief for Plaintiff in Error.

This writ brings up for review a decree in Chancery of New Jersey, affirmed on appeal by the New Jersey Court of Errors and Appeals. The bill was filed by the Attorney General of New Jersey, on the relation of the State Geologist, to enforce an Act of the Legislature of New Jersey, approved May 11th, 1905, (N. J. P. L. 1905, p. 461), as follows:

"Whereas, the available waters of the fresh water "lakes, ponds, brooks, creeks, rivers and streams of "this state do not increase with the growth of popula- "tion, and unless the same are carefully preserved, "will become inadequate to perform the functions they "were by nature designed to do, which functions are "essential to the health and prosperity of all the citi- "zens of this state. Therefore, be it enacted.

"1. It shall be unlawful for any person or corpora- "tion to transport or carry through pipes, conduits, "ditches or canals, the waters of any fresh water lake, "pond, brook, creek, river or stream of this state, into "any other state for use therein."

"2. It shall be the duty of the State Geologist to "keep a general oversight over the fresh water lakes, "ponds, brooks, creeks, rivers and streams of this "state, and to see that the same are preserved for the "use and benefit of the citizens of this state, and to "prevent the waters thereof from being carried or "transported by pipes, conduits, ditches or canals, into "other states for use therein."

The act continues that the State Geologist shall, through the Attorney General, bring suits in equity to preserve the waters of New Jersey streams for the use of the inhabitants of the state.

The bill was filed pursuant to this act. The defendant answered, and the case was brought on for hearing upon bill and answer, so that all the statements in the answer are admitted to be true. On the final hearing, by consent, certain contracts referred to generally in the pleadings were admitted in evidence. A decree for an injunction was made in Chancery, and was affirmed on appeal by decree of the Court of Errors and Appeals, and this writ of error is brought to review that decree.

Before the passage of the act, the plaintiff in error had contracted with certain railroad companies in Staten Island to deliver to them water from its water mains in the City of Bayonne, New Jersey (Trans. fols. 24 to 45), and, soon after the passage of the act, a contract—which had been previously negotiated—was executed between the City of New York and The Hudson County Water Company, whereby the Water Company undertook to deliver a supply of water to the Borough of Richmond, New York on Staten Island for the term of ten years, the city agreeing to take and pay for a minimum of three millions of gallons per day. (Trans. fols. 46 to 52.)

It is admitted by the plaintiff in error that it contemplates taking its water from its mains in the City of Bayonne, from a supply which is drawn from the Passaic River at Little Falls. The City of Bayonne has recently contracted for the laying of large mains by the plaintiff in error in that city, which have been laid, and which afford the city improved pressure for fire purposes. These mains also afford capacity for the delivery of a supply to Staten Island, and the City of Bayonne consents to such use, and is to receive Five Dollars ($5.00) per million gallons for any water sent beyond city limits, through its streets. (Trans. fols. 12, 22).

The mains of the company leading to Bayonne have a capacity of twelve million of gallons per day.

The facts admitted show that the amount of water possible to be taken from the state by means of the mains, is a very trifling part of the available flow of the Passaic River. Out of the estimate of five hundred and fifteen millions per day available for a water supply from the Passaic at Little Falls, in the driest year on record, the greatest possible draught through the mains of the defendant is less than two and one-half per cent. (Trans. fol. 13).

The Passaic supply is adequate for a population of five millions, while at present the population supplied from that river is about six hundred thousand.

The Croton River, with a little over four hundred square miles of drainage area, is found sufficient for a population of three millions. The Passaic, above Little Falls, has seven hundred and seventy-three square miles, and there is a substantial drainage area also below Little Falls.

The errors relied upon are that the decree sustains and enforces the act of 1905, above quoted, and that this act is void because it impairs the obligation of contracts; because it restrains interstate commerce in water and denies to citizens of other states the equal protection of the laws and the privileges of citizens of New Jersey; also that the decree denies to plaintiff in error the right to sell water from a running stream in New Jersey to citizens of New York in violation of the right of interstate commerce, and of the rights of citizens of New York to the privileges and to the equal protection of the laws of New Jersey. (Trans. fols. 14, 104, 105).

## ARGUMENT.

### I.

### The act of 1905 is an attempt to control Interstate Commerce and cannot be sustained under the Police Power.

As is established by principle and authority, the court must examine the reasonableness of a claim to support a state statute regulating commerce, under the guise of an exercise of the police power. The act of 1905, as applied to the Passaic, is without any justification in the needs of the inhabitants of the state. The situation of Staten Island, like that of Hudson and Essex Counties, is such that the Passaic is the only available source of supply of soft water suitable for both domestic and manufacturing purposes.

It is well known that the Passaic has its sources in the Mountains of Southern New York and Northern New Jersey, and that its floods are overwhelming in volume, and destructive. In the flood of March, 1902

the flow in eight days at Little Falls amounted to an average of 9,577 millions of gallons per day; that is to say, in each one of these eight days there ran into the sea, water enough to supply Staten Island ten millions of gallons per day for two and a half years; and in the eight days more than enough to supply it for twenty years.

The flood of October 10th, 1903, was even greater. For a period of eleven days the flow averaged 9,285 millions of gallons per day. (N. J. Geol. Rep. 1903, p. 24).

Apart from these great floods, the flow for the driest year on record is so great that, if reasonably impounded (as it has already been to some extent), the daily yield will exceed five hundred millions of gallons, while as appears by the bill, the present daily consumption from the Passaic by New Jersey towns, is ninety-two millions of gallons per day. (Trans. fols. 6, 7, & 13).

It is apparent that the prediction of the bill, that all the waters of the Passaic will be needed for the water supply of New Jersey towns, assumes a population to be supplied from that source of about five millions, an assumption too contingent, and made for a period too remote to warrant any action in this generation.

The water of the Passaic, which is now running to waste into the sea in immense quantities, has a very great market value delivered to customers, who stand ready and desire to receive it, and devote it to the most valuable uses of which water is capable.

The act of 1905 is a declaration that the State of New Jersey prefers that the water should run idly into the sea rather than that the people of a sister state should receive it. By that act, the state says, that the

disposition of the people of New Jersey to those citizens of New York is so hostile and unfriendly that New Jersey desires to injure them without any benefit to itself; it prefers that the water should be wasted rather than that they should have any good of it. More than this, in its anxiety to prevent its neighbors in Staten Island from obtaining any benefit from the water which it cannot use, it attacks, by this act, its own citizens, and forbids the owners entitled to take the water, from devoting their property to a most profitable use, and deprives them of their legitimate revenue therefrom. The act undoubtedly interferes with interstate commerce.

Water when reduced to possession is a commodity, which may be sold, like any other.

*Syracuse* vs. *Stacey*, 169 N. Y. 231, 245.

In the case of the *N. J. Suburban Water Co.* vs. *Harrison*, (unreported), Judge Pitney stated the law as follows:

> "When the land-owner, in the exercise of his rights as such, has withdrawn from the stream a portion of the water flowing therein, the water thus withdrawn is his personal property. If he has acquired the right to divert it or to sell it, it may be retained as personal property, and disposed of as such. So far as appears in this case, the East Jersey Water Company, in the exercise of lawful rights, had withdrawn the water in question here from the natural water courses, and had gathered and collected it, and was disposing of it as its own property. That is, as a commodity. Each thousand gallons might have been separated in casks or other receptacles. As a matter of convenience, it was allowed to flow through conduits, the consumption being continuous, and the supply being likewise con-

> tinuously maintained. Nevertheless, it remained as personal property, subject to bargain and sale as such, and subject to delivery, according to the circumstances of the case."

The judgment in this case was affirmed. *Suburban Water Co.* vs. *Harrison*, 72 N. J. L., 194.

The statute of 1905 actually prohibits commerce in water with another state, because the only practicable method of carrying on such commerce is through pipes or conduits. The only ground upon which such a statute can be justified, is that it is a proper exercise of the police power of the state, and the act of 1905 purports to exercise police power, and the bill puts the case on that theory. (Trans. fol. 7).

When a statute, interfering with interstate commerce, is founded on the police power of the state, the question always arises whether the act goes beyond the necessity for its exercise. This question is judicial. The reasonableness of the statute is an element of the inquiry whether it encroaches upon the national authority.

*Railroad Co.* vs. *Husen*, 95 U. S., 473.

Approved in *Lake Shore Railroad Co.* vs. *Ohio*, 173 U. S., 285, 300.

The same rule was applied in a recent case involving the New York Statute as to the hours of labor for bakers.

*Lochner* vs. *New York*, 198 U. S., 45.

In *Mugler* vs. *Kansas*, 123 U. S., 623, 661, the court said that it was not to be misled by pretences; that the court must look at the substance of things when they inquire whether the legislature has transcended its authority.

This rule must be the rule in the very nature of things. By no other rule could the court preserve the constitutional right to free trade between the states. If the mere declaration of the legislature that its statute is intended to protect the public health and safety were conclusive, the constitutional restraint would be worthless.

In considering the reasonableness of such a statute, a decisive ground against it is, that it discriminates in the exercise of the alleged police power in favor of citizens of one state and against those of another. A statute which might otherwise be a proper and reasonable exercise of police power, will, nevertheless, be void, if it discriminates against citizens of other states.

In *Walling* vs. *Michigan,* 116 U. S., 446, 455, the statute under consideration imposed a license fee upon non-residents of the state who should sell, at wholesale or upon orders, liquor to citizens of the state. Bradley, *J.,* said, that this act discriminated against commerce with residents of other states, and was, therefore, void; that the non-action of congress, under its power to regulate, was equivalent to a declaration that commerce shall be free.

In *Minnesota* vs. *Barber,* 136 U. S., 313, 325, the act forbade the sale of meat in the state, unless the live animals were officially inspected by state inspectors within twenty-four hours before they were slaughtered. The court said that the effect of this act was to prevent the citizens of other states from selling, and to prevent the citizens of Minnesota from buying, meat from animals slaughtered out of the state. The discrimination strikes both at Minnesota buyers and at sellers from other states, and both are aggrieved by

the act. The court approves *Walling* vs. *Michigan*, and holds the statute void, for discrimination.

To the same effect, under an act for meat inspection in Virginia, see *Brimmer* vs. *Rebman*, 138 U. S., 78.

In *Scott* vs. *McDonald*, 165 U. S., 58, the statute forbade the possession or transportation or purchase of liquor in South Carolina, unless purchased from the state agent. This act was held void. The court approved the case of *Walling* vs. *Michigan*, that an act justifiable under police power becomes void, if it discriminates against the citizens and products of other states, and said:

> "It is sufficient for us to hold that when a state recognizes the sale and use of intoxicating liquors as lawful, it cannot discriminate against the importing such articles from other states; that such legislation is void, as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states."

In *Indiana* vs. *Indiana, etc., Oil, Gas & Mining Co.*, 120 Ind., 575; 6 L. R. A., 579, an act prohibiting the piping of natural gas out of the state was held unconstitutional as interfering with interstate commerce.

In *Benedict* vs. *Columbus Construction Company*, 50 N. J., Eq., 23, 38, the Chancellor of New Jersey considered a later Indiana statute forbidding the piping of gas at a pressure beyond 300 pounds to the inch, and forbidding artificial pressure. This would cause a reduction of pressure as the distance increased, and would have prevented the piping of gas out of the State of Indiana. McGill, Chancellor, said, that considered as an exercise of the police power, the act was void for unreasonableness and discrimination. No

reason appeared why safety could not be maintained by an even pressure. "As a police regulation, this provision of the law, upon its face, appears to be an absurdity."

The Chancellor said that the purpose was evident to prevent the taking of gas out of the state, and such a purpose was an unlawful interference with interstate commerce, which requires the use of pipes to convey gas for a long distance in large quantities.

The application of these principles to the present case demonstrates that the act is utterly void. The statute does not attempt to regulate the taking of water by all parties; it absolutely prohibits the piping of any water from New Jersey streams out of the state, while it leaves the owners of the water at full liberty to pipe it at will to towns in the state.

It is an arbitrary interference with the right of the owners of the water to sell it out of the state, and with the right of citizens of other states to buy their water in New Jersey.

The Attorney General argues that there is an exercise of the police power, because the water has performed some service in diluting the sewage which is poured into the streams. He contends that the more water that is taken out of a stream, the less remains to dilute the sewage which is poured into it below the point of diversion.

The pollution of the stream by sewage is a violation of the rights of the riparian land owners and has been so adjudged by our courts. It is an abused ground to deprive one party of his property in order to diminish the effects of an unlawful act by another party. The appropriate remedy for the pollution of the streams is to stop that pollution. There is nothing in the diminu-

tion of the flow of water in a stream which will tend to pollute the water. But, even if the argument were well founded in fact, it is apparent that the diversion of water for use within New Jersey is quite as effective in reducing the flow of the stream as the like diversion for use out of the state. The act discriminates against consumers out of the state, and in favor of those within the state, and, on the authorities above cited, it is manifestly void for that reason.

## II.

## The act is void because it denies equal privileges to citizens of another State.

Article IV of the Constitution provides, that all citizens of the United States shall have the privileges and immunities of the citizens of the several states.

In the case of *Minnesota* vs. *Barber*, 136 U. S., 313, above cited, it was held that an act which prohibited the sale of meat brought from other States in Minnesota, was a denial to citizens of other states of privileges of the citizens of Minnesota, in violation of Article IV.

A similar view of the law is found in the case *In re Watson*, 15 F. R., 511; there, a state statute provided that only licensed peddlers should peddle goods in Vermont, and that only those persons who had resided in Vermont for one year should be licensed. This act was held wholly void, because it denied the privileges of the citizens of Vermont to citizens of other states.

To the same effect is *Ward* vs. *Maryland,* 12 Wall., 418, where non-residents were forbidden to sell goods in Maryland without a license.

In *Connolly* vs. *Union Sewer Pipe Co.,* 184 U. S., 560, a state act against monopoly contracts was held void because it excepted contracts of farmers.

The right of citizens of New York to buy water in New Jersey, and to transport it by the usual means of transit, is just as full and complete as the right of citizens of New Jersey; in such a traffic, state lines must be wholly disregarded. The right applies to all citizens of the United States equally, and no discrimination can be permitted in favor of the citizens of one state over those of another.

## III.

## The decision of the State Court, under review, does not control this Court as to the right to divert water from streams in New Jersey.

The Court of Errors and Appeals did not rely upon the argument of the Attorney General, which sought to sustain the act as an exercise of police power, but instead set up a novel claim that the State of New Jersey is the owner and proprietor of the running water in streams, and that it may, therefore, by statute restrict the use of the water by riparian owners at its pleasure. The attempt is to bring the case within the ruling of this court in the Oyster Bed Cases, (*McCready* vs. *Virginia*, 4 Otto., 391), where it was held that since the state was the exclusive proprietor of the oyster beds, it might select its tenants at will, and so might limit them to citizens of the state.

Another decision of this court, also relied upon, by defendant in error is *Geer* vs. *Connecticut,* 161 U. S., 519, 527, where the right of the state to prohibit the taking of game out of the state has been recognized.

The ownership of the oyster beds, being lands under tide water, is a common law title, to which the state has succeeded as successor of the King. So, too, the taking of game was a royal prerogative, and the state has succeeded to the King's rights. No private owner has any property right in the land under tide water, or any property right to take wild animals, except subject to the prerogative right established at common law. The riparian owners on a private stream are owners in common of a right to appropriate and divert all its waters, and no prerogative right in the King or State to these waters has ever been known to the common law.

It may, however, be contended that the decision now under review establishes the state doctrine and is controlling in this court.

States vary in their methods of regulating the use of the waters of streams in their territory, and, in general, the state doctrine is adopted in this court as to the relative rights of abutting owners. But, here, by the decision under review, the State of New Jersey claims to be itself the proprietor of these waters, and, as such, undertakes to prevent interstate commerce in them.

We submit that this court is not controlled, in any degree, by the decision of the state court herein, for several reasons:—

(a) It is well settled that a state cannot change the common law, either by judicial legislation or by

act of the legislature, so as to take property without due process of law. In New Jersey, the common law determines the right to divert running water, and vests it in the riparian owners as a right to be enjoyed by them in common, subject, only, to such modifications of the right as they may create by contract or grant among themselves.

*Louisiana* vs. *Pillsbury*, 105 U. S., 278; *Chicago, B. & Q.* vs. *Chicago*, 166 U. S., 226, 233; *Loeb* vs. *Columbia Township*, 179 U. S., 472, 492; *Muhlker* vs. *Harlem, R. Co.*, 197 U. S., 544.

In *Tampa Water Works* vs. *Tampa*, 199 U. S., 241, 243, this court, on writ of error to the Supreme Court of Florida, sustained the interpretation by the state court of the state constitution in its effect upon a contract, but treated that interpretation as subject to review and not conclusive.

When the question of impairment of a contract by state statute is raised, the court will not accept as final the interpretation of the statute or contract given by the state court whose judgment is under review, but will itself interpret in order to see whether the contract has been impaired.

*St. Paul Gas Light Co.* vs. *St. Paul*, 181 U. S., 142, 147.

On the same principle, where the owner of property claims that his right of interstate trade is destroyed by a state statute and that his property is thereby taken without due process of law, the decision of the state court, that the statute is valid because the state has some title to his property, must open the inquiry as to the relative title of the state and citizen.

(b) Further, we submit that where a statute or decision operates directly in restraint of interstate commerce, the Federal Court will not defer to state authority, but will independently investigate the grounds of the decision by the state court. Otherwise, the Federal control of interstate commerce would soon be greatly narrowed. In this case by setting up a claim to a vague and undefined interest of the state in running streams, it is sought to destroy free trade in water. The New Jersey Legislature and the Court of Errors and Appeals have left the waters of New Jersey streams to be taken and used as private property except for the purpose of interstate commerce, and the court has set up a theory of state ownership so guarded as to operate only against Federal control. A like claim could be made, with equal force by judicial or legislative declaration, to all other products of the soil, mineral or vegetable, to the destruction of the freedom of interstate commerce.

It will be observed that the act of 1905, which the court below sustains, does not interfere with the right of diversion and sale of water, so long as it is sold within the state, nor does it forbid the transportation and sale of water out of the state, except where pipes and conduits are used for such transportation. The act bears directly upon the means of transportation of an article of merchandise. It permits water to be taken from streams and become a commodity, but hampers the dealer who seeks a market for it out of the state, by forbidding him to use the best and cheapest means of transportation.

If we admit (as we do not), the state's title to the stream water, the question still remains whether the

state can permit this water to pass into private ownership and become a commodity, and yet retain power to restrict the mode of transportation in the course of interstate traffic. If such a claim can be maintained, it will be difficult to set bounds to it.

Suppose a state statute should forbid the transport of coal from mines in the state to customers in other states in railroad cars, while permitting wagon traffic. When a mine owner challenged the law, would a state decision sustaining it be conclusive here, because the state court should say that it had just discovered that all mines belong to the state and that the rights therein of private owners are enjoyed by the sufferance of the state, and that the state can therefore restrict the interstate traffic, leaving state traffic free?

The fourteenth amendment might be evaded on like grounds. Suppose that the Nevada legislature should enact that no mines should be worked except by members of a particular trade union, at such wages as the union should fix, and the courts of that state should sustain the act against the mine owners on the sudden discovery that at common law all mines belong to the state, and that the mine owners enjoyed mere rights by tolerance. Would such a declaration conclusively establish the doctrine and thus disable this court from looking into the title of the mine owners and giving them relief against the penalties of the act?

The doctrine against which we contend would come to this, that the control of interstate commerce and the jurisdiction of this court would be wholly at the mercy of the state court, and could be defeated by the state court by a moderate degree of ingenuity in basing the decision on new claims of state title and policy. In

ever arose, it is true that the state is the residuary owner of all property in its territory, by virtue of its right of eminent domain—indeed, at common law and in the absence of constitutional provision, private property may be taken for public use without compensation; but this title cannot be so stretched as to destroy interstate traffic. To take property for public use is one thing; but to hamper the private owner in his sale of it out of the state, in order to give exclusive privilege of its purchase to the citizens of the state, in the exercise of a power which by no means follows from the right of eminent domain. We submit that it would not follow, even if the state absolutely owned in fee the land from which it permitted private owners to take property and make merchandise of it within the state.

All land titles in New Jersey are derived through the grant made by Charles II to James, Duke of York, which carried everything susceptible of private grant. The lands under tide water did not pass, because at common law the King held them in trust for the public and could not alien them. The title to fresh water lakes and streams all passed into private ownership at that early date, so that no change of state policy at a later date could impair the title thus conferred, as is pointed out in the case of *Gibbs vs. Davenport*, fully cited in our next point.

The extent of the title of riparian owners in New Jersey lakes and streams was established as common law principles prior to 1905, and the plaintiff in error entered into contract obligations to sell stream water out of the state before the enactment of 1905. (Transcript fol. 37).

The decision now under review, and the act of 1905, are both attempts to change the common law in order to destroy the vested and contracts rights of the plaintiff in error.

The Federal Courts will not follow the state courts in the interpretation of state law where it appears that the state courts have undertaken to change the law in such manner as to destroy contract and vested rights, or so as to take property without due process of law.

We claim the right to have our case considered here fully on the merits, as a common law question, unhampered by any considerations of modern state policy. *Ohio Life & Trust Co.*, vs. *Debolt*, 16 How., 416, 432. *Chicago* vs. *Robbins*, 2 Black, 418; *Myrick* vs. *Mich. Cent.*, 17 Otto., 102.

## IV.

## The act of 1905 is an attempt to impair the obligation of contracts of the plaintiff in error.

In 1904, the plaintiff in error made a contract with the City of Bayonne, New Jersey, to fulfill the terms of an ordinance whereby the company was to lay larger mains in the streets, and was to use these mains, among other purposes, to supply water to consumers in Staten Island, paying to the city for this use of its streets five dollars per million gallons conveyed through the streets. This contract was made by acceptance of an ordinance and by an agreement to fulfill its terms. (Trans. fol. 25).

The answer (which is taken as in all points true), shows that these mains in Bayonne were laid in 1904 (Fol. 12). In the same year, the plaintiff in error contracted with several large consumers of water in Staten Island to supply them with water through pipes from Bayonne (fol. 12). One of these contracts is in evidence, and designates, as the source of supply, the mains of the New York and New Jersey Water Co. (Fol. 41, Par. XIII), which company obtained its supply from the Passaic River, under contract with the East Jersey Water Co. (Fol. 32).

The act of 1905 was, no doubt, inspired by these contracts and by the negotiations with the City of New York, which took form in the contract with the city signed soon after the passage of the act (Trans. fol. 48).

The effect of the act is directly to destroy the contracts with consumers in Staten Island, by requiring the Court of Chancery to enjoin their fulfillment. Unless, therefore, the contracts were invalid upon other grounds than those created by the act of 1905, that act is void, as impairing the obligation of contracts, and the decree for an injunction should be reversed.

We proceed to discuss questions raised by the court below.

## V.

### The waters of running streams in New Jersey are the common property of the Riparian land owners.

What we contend is this: Any riparian owner on a fresh water stream may divert and use as much water as he chooses, so long as he does not impair the like right of the owners down the stream without their consent. If he has their consent, he may divert up to the whole flow of the stream. A riparian owner nearest to tide water may divert the whole flow since there are no owners on the stream below him to be injured.

The Court of Errors and Appeals sustained the decree for injunction, on the ground that the act of 1905 is valid because the state is the owner of the running water in streams. (Folio 97.)

It is really a matter of little importance to know who, if any one, owns the water while running in the stream, because the real question is not the ownership of the water while running, but of the right to take it and divert it.

The authorities, however, are unanimous that running water is incapable of ownership, and that neither the state nor the riparian owners have any title in it until it is appropriated.

In *Sweet* vs. *Syracuse*, 129 N. Y., 316, 335, the court considered the validity of an act permitting the city to take, for the purposes of a public supply, water from a lake which the state had appropriated as a reservoir for the Erie Canal. The existence of any

property right of the state in the water was expressly repudiated by the court. O'Brien, *J.*, said:

> "Neither the sovereign nor subject can acquire anything more than a mere usufructuary right therein. In this case the state never acquired, or could acquire, an ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, although it could and did acquire the right to its use."

In *City of Syracuse* vs. *Stacey,* 169 N. Y., 235, 245, the court said:

> "Water, when reduced to possession, is property, and it may be bought and sold and have a market value; but, it must be in actual possession, subject to control and management. Running water in streams is not property, and never was."

The same doctrine prevails in New Jersey.

In *Society* vs. *Morris Canal,* 1 N. J. Eq., (Saxton), 157, 189, the society filed a bill to enjoin the Canal Company from diverting water from the Passaic River. Chancellor Vroom said, that the principle that assigns to everything capable of ownership a determinate owner, is salutary; but, he says: "This prin-"ciple can only be applied to streams of water in a "limited sense. There is no such thing as actual prop-"erty in running water."

Whether or not it be conceded that the state has some sort of property in running water, in the absence of any other owner, the question still remains, who has the right to appropriate and divert this water?

There is a case long famous in New Jersey, which has been regarded as conclusively establishing the private ownership of the fresh water ponds and streams in that state, namely, *Cobb* vs. *Davenport,* 32 N. J. Law, (1867), 369. The counsel were Joseph P.

Bradley and Henry C. Pitney, and the opinion was that of Justice David A. Depue. The owner of a natural fresh water pond sued a trespasser who denied the complainant's title on the ground that the state had title to the land and waters of the pond, so that the question of the state's title was directed involved, notwithstanding the opinion to the contrary of the state court in this case. Depue, *J.*, said:—

> "The defendant, in the first place, insists that the plaintiff acquired no title to the *locus in quo* under the said grants, because the title to the lands under the waters of the pond was not in the proprietors, but in the State of New Jersey. This constituted the main subject of discussion on the argument before this court.
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> "The policy of the common law is to assign to everything capable of ownership a certain and determinate owner, and for the preservation of peace, and the security of society, to mark by certain *indicia,* not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common, and private rights. If capable of occupancy, and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership and enjoyment are inconsistent with the nature of the property, the title is in the sovereign, as trustee of the public, holding it for common use and benefit.
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> "In pursuance of this policy, by the common law, all waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter in the individual proprietor. The title of the sovereign being in trust for the benefit of the public—the use, which includes the right of fishing and of navigation, is common. The title of the indivi-

dual being personal in him, is exclusive—subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact.

"The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows—so far only as the sea flows and reflows, are public waters, and those in which there is no ebb and flow of tide, are private waters.

"These principles of the common law are so well settled, that a citation of authorities on the subject is quite unnecessary. They are stated and illustrated in Hale's Treatise, *De Jure Maris*, a book of so high authority, that from it there seems to be no appeal, either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water.

"And all the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law.

"The tidal test, as distinguishing waters in which the property is in the sovereign, from those in which it is in private individuals, was said on the argument to be founded in no principle. Many of the rules of the common law, by which rights are ascertained and property is acquired, held, and transmitted, if subjected to such criticism would be found to be equally devoid of principle. As a rule by which individuals may be guided in ascertaining what rights belong to them, as a portion of the public, and what are exclusively within the domain of private ownership, it has the merit of uniformity and certainty, and is easy of application. The criterion suggested on the argument, of holding all rivers which are naviga-

ble in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the additon of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation, and thus the way is opened for discussion and disturbances.

"A more perfect system of regulations on this subject, than that stated by Lord Hale, could not be devised. It secures common rights as far as the public interest requires, and furnishes a proper line of demarcation between them and private rights. Valuable interests,—such as the rights of fishery, to the soil in the bed of the stream, and of mines and minerals that may be therein, and of having a boundary, if on a private river, and consequently the ownership carried *ad medium filum aquae,* instead of the precarious right of mere adjacency, depend upon this system. By it navigation is adequately protected, for all waters, whether public or private, if navigable in fact, to that extent are subjected to public use; and there is no justice or propriety in making these private rights to depend on the question of navigability, with which they are in no wise connected.

"In this state there is nothing in topography or location that requires a departure from the rules of the common law. Unlike some of our sister states, we have no large inland lakes, which are, in fact, inland seas, upon which an extensive commerce is carried on, or which are the boundaries with a foreign nation. None of our inland lakes have been required for the purpose of commerce, and only one, Lake Hopatcong, through which the Morris canal runs—has been used for naviga-

tion. Our system of land titles, and the decisions of our courts, have been in conformity with the common law on this subject, and whatever departure has been therefrom, has not been to enlarge the public domain at the expense of private ownership, but rather to permit encroachments upon the public right for the benefit of adjacent individual proprietors. *Arnold* vs. *Mundy*, 1 Hal., 1; *Gough* vs. *Bell*, 2 Zab., 440; *Bell* vs. *Gough*, 3 Zab., 624; *Martin* vs. *Waddell*, 3 Harr., 495.

"In these cases the tidal test, as distinguishing the *jus publicum* from the *jus privatum*, is recognized, and is assumed to be in force in this state. And it should not be overlooked, in this connection, that the title to the soil in the territory which constitutes the State of New Jersey, passed from the crown in 1664, the date of the first grant of Charles the Second to the Duke of York, and that this grant, as well as the surrender by the proprietors in 1702, was made when the English common law was in full force, and before any local common law had opportunity to take its origin. The instruments of grant and surrender, so far at least as private rights are concerned, are, therefore, to be construed by the rules of the common law which were then in force."

This case has been repeatedly approved and followed in the New Jersey Courts, including the court of last resort.

In *Attorney General* vs. *Del. & Bound Brook R.*, 27 N. J. Eq., 631, the Attorney General set up a claim that the Delaware River above tide water was the property of the state. This claim was denied by the Court of Errors and Appeals, and *Cobb* vs. *Davenport* was approved. In the course of his opinion, Depue, *J.*, quoted from Lord Hale as follows (p. 638):

> "Fresh rivers of what kind soever, do, of common right, belong to the owners of the soil adjacent."

In the same court, in *Higgins* vs. *Flemington Water Co.*, 36 N. J. Eq., 538, 543, where an owner complained of diversion of water to his injury, Beasley, *C. J.*, stated the law as follows:

> "It is settled that the right to a flow of water is an incident to the proprietorship of the lands along or over which such stream flows; that such right is common among all such proprietors, and that each of them is entitled to its reasonable use, and that so long as such use be reasonable, a co-proprietor cannot complain of the consequence of such appropriation."

In *Albright* vs. *Cortright*, 64 N. J. L., 330, 337, the Court of Errors and Appeals approved and followed *Cobb* vs. *Davenport*, and said that it "declared and followed the ancient and established law," and that the local conditions of New Jersey closely resembled those of England, so that a different rule was not called for.

In *Simmons* vs. *Paterson*, 60 N. J. Eq., 385, 389, the case of *Cobb* vs. *Davenport* was expressly approved by the Court of Errors and Appeals, and in the course of the opinion of the court, Van Syckel, *J.*, said (p. 391):

> "Riparian owners above tide own *ad medium filum aquae* and have a property right in the water flowing along and over their land. This property right cannot be impaired except by the lawful use of the waters by riparian owners higher up the stream."

Finally, in *Doremus* vs. *City of Paterson*, 65 N. J. Eq., 711, 713, in the same court, the law in New Jersey was stated as follows:

"The bed of the Passaic River above tide is private property, the proprietorship of which is in those who own lands bordering on the stream. And not only the bed of the river, but the waters flowing over it until they reach tide are the private property of such owners, and this is so because the waters are part and parcel of the land itself. The bed of the stream belongs to the riparian owners in severalty, each owner owning the land under water in front of his ripa to the middle of the stream; each owner is entitled to have the waters flow past his lands undiminished in quantity and unimpaired in quality by the act of any of the other of the owners thereof. Each owner is entitled, as against the others, to use the passing water in a reasonable manner for domestic uses and for the irrigation of his lands. He may also divert the flow thereof for his own purpose, provided he returns the waters again to the stream, unpolluted and in the same volume, at a point above the lands of lower owners. More than this, he is entitled to abstract them permanently, as against all his co-owners, except those whose lands lie further down the stream. Generally speaking, each riparian owner has a right to devote the waters to any use which he may see fit, provided that, in doing so, he does not injuriously affect the rights of any of the other proprietors therein. And this right cannot be restricted by the act of any other of the proprietors. A proprietor may grant to third persons, who are not riparian owners, rights in the waters; he may permanently abstract the waters for their use, or he may permit them to do so, without the consent of the owners above him."

These principles accord with the common law doctrine as generally recognized.

In *Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303, 320. Vann, *J.*, said, that the riparian owner has the right

to a reasonable use of the water as it passes by his land.

> "As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. *This is the common right of all,* which must not be interfered with by any."

Consumption by cattle or by irrigation, although involving some loss, is permissible "in order to effect the highest average benefit to all riparian owners."

In *Pierson* vs. *Speyer,* 178 N. Y., 270, complaint was made of diversion for the purpose of irrigation, thereby causing a diminution of the flow by reason of evaporation or absorption. It was held, that this was not an unreasonable use, and that it was therefore lawful.

Since these rights are private property and alienable, it follows that after a diversion for twenty years, a grant is presumed against the owners down the stream.

> "The others have lost the natural right of using the water in common; their enjoyment must be subject to that of the complainant."

*Shreve* vs. *Voorhees,* 3 N. J. Eq., 25, 34.

In *Acquackanonk Water Co.* vs. *Watson,* 29 N. J. Eq., 366, 370, Dodd, *J.*, states as the only limit on diversion, that it must be with the consent of the adjoining proprietors, to whom the water would otherwise descend

In *Sparks Co.,* vs. *Town of Newton,* 57 N. J. Eq., 367, 377, the court cites English cases recognizing the right of the riparian owners to grant the right to divert, and in the same case the town was required to

pay the riparian owners damages for diversion notwithstanding permission given by the state, and this view was sustained on appeal, 60 N. J. Eq., 399.

See also, *Mason* vs. *Hill,* 5 Barn. & Ad., l. 25.

*Race* vs. *Ward,* 4 El. & Bl., 702.

In *Miner* vs. *Gilmour,* 12 Moore P. C., 131, 156, the court after stating the right of the riparian owner to appropriate water for ordinary domestic uses, continues: "But further he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it provided that he does not thereby interfere with the right of the other proprietors either above or below him."

These decisions establish two propositions: First, only a riparian proprietor can object to diversion from a running stream. Second, such proprietor may grant or waive his right, and cannot object to diversion, unless he shows substantial injury to his property therefrom.

## VI.

## The State, as owner of the land under tide water, has not the right of a proprietor on a running stream.

The Attorney General seeks to take this case out of the rule that the state cannot interfere with interstate commerce, on the ground that the state, as the proprietor of land under tide waters, has the property right of a land owner on a running stream, and that such property right includes the right to have the fresh water flow into the tide water.

This is a novel doctrine, and is one not sustained by reason or authority. It is not only condemned by

its novelty, but is inconsistent with the rights of the owners on the fresh water streams as shown by the decisions above stated.

(a) *The absurd results of the doctrine are enough to condemn it.*

If the state, as the owner of land under the tidal river, can insist upon the flow into it of all fresh water streams which discharge into it, then the doctrine cannot be limited to the state; it must extend to all owners of land abutting on the tide water river, and to all grantees from the state, of land under tide water. Furthermore, the right cannot be limited to the owners on or under that part of the tidal water which happens to be called a river. It must extend equally to the owners of bays and sounds into which the running stream discharges.

In this case, not only the State of New Jersey, but also the State of New York owns land under the waters of Newark Bay, and, therefore, the State of New York may, on the doctrine asserted enjoin the diversion to Jersey City, Hoboken and Bayonne, by transporting water from the Passaic and Hackensack, which, but for the diversion, would pass into Newark Bay, and through Staten Island Sound, and the Kill-von- Kull.

The same doctrine makes the diversion from the Croton a taking away of the property right of New Jersey under the Hudson River. The state owns land to the middle of the Hudson, and, on this doctrine, is entitled to have the Croton waters flow into the Hudson and thence over the State's land under water. No such rights of owners under tide water were ever heard of, because they do not exist. The line between the owners of private waters and

public waters is well defined; the private waters cease with the tide. Tidal waters are the navigable waters of the United States, and the land under them alone is the land of the state. There must be somewhere a line, below which the shore owners have no interest in the use of the running stream, and the only possible line is that which is well established, namely, the line of high tide, where the running stream ceases.

*Cobb* vs. *Davenport,* 32 N. J. L., 369, 379.

Among the sources of supply contemplated for the City of New York is the Ramapo, most of the drainage area of which lies in the State of New York, but which empties into the Passaic in New Jersey, above Little Falls. If the City of New York shall appropriate that stream in its own territory, there can be no doubt that the New Jersey mill owners, and other owners upon it, who can show damage, must be compensated. But, will any one contend that compensation must also be made to the State of New Jersey, or to any other owners of land on tide water? No such claims of interest were ever yet recognized. The existence of such rights is condemned, *gravissimo judicio silentii.*

(b) *The state shows no injury to its land from the diversion.*

The rights of diversion which a land owner, with access to a running stream, has, are to draw from it as he needs. A taking by an owner up stream; if carried to excess, may deprive the lower owner of water sufficient to answer his needs, and, if so, he has a grievance. But, the supply of an owner on tide water cannot be diminished by any obstruction or diversion of the running stream, nor is any diminution or injury alleged in this case.

The claim of the attorney general, in this phase of the case, rests on the bare fact that the state owns the land under the tide water into which the Passaic discharges. No injury to the state's land from diversion is stated, nor are any facts stated from which such injury can reasonably be inferred. As we have shown, even a true riparian owner cannot complain of a diversion which does not substantially injure his property.

The case of the state, apart from the statute of 1905, rests, therefore, on the untenable proposition that the state, as riparian owner, on tide water has the right to receive the whole flow of the water which runs in the stream, regardless of any injury from its diversion. Riparian proprietors on fresh water streams have no such rights.

The Attorney General has shown no injury, apart from the injury created by the act, calling for the intervention of a court of equity. The grievance alleged here, if we disregard the act of 1905, is, in effect, that the defendant threatens to injure the property of the state. To obtain the aid of a court of equity in such a case, the Attorney General must show a serious and pressing public injury. There is an exception to this rule where a company, under color of a public franchise, is transcending its powers, and where the information is filed on that ground. This distinction is clearly set forth in *Grey, Attorney General* vs. *Greenville & Hudson Railroad*, 59 N. J. Eq., 372, 387, affirmed on this point, 62 N. J. Eq., 772. (Note that the reference in 62 N. J. Eq. on page 772 is wrong. It should be 14 Dick., 372).

This case is not within the exception; the information is not filed to keep the defendant within its

charter. The argument is that it is to protect the state's rights as proprietor in its land, and as to this ground the case must stand precisely as if the defendant were a natural person. It is clear that no serious public injury to the state's land is threatened by defendant, so that the decree cannot be sustained, unless it is warranted by the act of 1905.

(c) *To establish the claim of the state would destroy established property rights.*

The rule of complete common ownership of fresh water streams by the riparian owners, leaves no room for the owners of land under tide water. We have shown by abundant decisions that the waters of a running stream are the common property of the owners on that stream. In no case has any such barren right of the state as the court sustains ever been heard of to have the benefit of the full discharge of the fresh water into tide water. If any such right existed it would have been asserted long ago. While no doubt the state is often slow to assert its rights, yet in England the King has often been aggressive and ingenious in seeking out rights of property, and surely would at some time in English history have asserted the right, if it existed. It is characteristic of our common law system that the relative rights of state and citizen are established by precedent. It is now proposed by a Chancery decision to encroach gravely upon a very valuable private right, and to make its future enjoyment dependent upon the permission of the state. Much litigation has arisen, both in England and in this country over the diversion of water from streams, and it has often happened that the Attorney General has been a party, yet never before this case has it been pretended that the state had this property

right. To create it now by a decision would be an act of far-reaching consequences. It would be a blow to large vested property rights, greatly impairing their value by introducing a power of veto in the state upon their most valuable use. The statute and the decision under review make every town and every Water Company drawing water from streams in the state, trespassers upon the property rights of the state, except in the few cases where special private and municipal charters happen to specify that water may be diverted from streams. Such an extension of state property at the expense of private owners is an act of arbitrary spoliation and a violation of constitutional rights. Its extravagance and its novelty are unanswerable arguments against its existence as a common law right.

## VII.

## Comments on the Opinion.

The court enters upon an elaborate discussion of the extent of the possible powers of The East Jersey Water Company, and shows that the only sections of the General Corporation Act of New Jersey which give powers to condemn water rights do not apply to that company. (Trans. fols. 77-83). This appears to be irrelevant to any issue made by the pleadings. The bill raises no question of the powers of that company, and it is named only as a company having a pumping and filter plant on the Passaic River from which the plaintiff in error expects to procure water. (Fol. 4). The East Jersey Water Company is not a party to this suit. and its powers cannot properly be determined in its absence. It does not appear that any power to condemn is necessary. If it were material we might show that the court's argument that

the company can have no special statutory powers conferred upon it to take water from the Passaic River, is by no means conclusive, since there are private acts giving to private corporations such powers, and their franchises may have been acquired by the East Jersey Water Company, but it is not necessary to show any franchise from the state in order to authorize a grant from the riparian owners to appropriate and sell private waters. The General Corporation Act of New Jersey, like most State Corporation Acts permits corporations to be formed for any lawful business, and this means that they may carry on any business lawful for individuals. The taking, transporting and sale of water by a riparian owner requires no franchise. The law was stated in *Atlantic City Water Works* vs. *Consumers Water Co.,* 44 N. J. Eq., 427, 432, by Van Fleet, *V. C.,* as follows:—

> "The right to sell water is not a prerogative of government, but is a business in which any person may engage without legislative authority."

The statement in the opinion (fol. 84) that at common law the right of diversion of the riparian owner must leave the stream substantially unimpaired in quantity requires modification; it is only true in favor of owners lower on the stream, and they may grant or waive their rights as above pointed out. It is not correct to say (fol. 87) that the "exercise of all rights of private ownership by all riparian owners still leaves the stream to remain as a running stream." This statement is in hopeless conflict with the common law, and with the latest previous expositon thereof in the same court in New Jersey as will appear from the quotation above from *Doremus* vs. *Paterson,* 65 N. J. Eq., p. 712. It is strange to find quoted in favor of

the doctrine of state ownership of private waters the case of *Cobb* vs. *Davenport,* where, as will appear from our full quotation above, that doctrine was rejected in the plainest terms. We repudiate the argument imputed to us in the opinion (fol. 89) that the State of New Jersey has departed from the common law; on the contrary, as we have argued, the common law, as it existed in the time of Charles II establishes the title of riparian owners, and has been maintained in New Jersey down to the decision now under review. On behalf of the people of other states we make no such claims, as are credited to us by the court (fol. 94). What we do claim is that the riparian owners and their grantees may sell the waters of their streams, and that their right to sell to customers out of the state as well as to those within it is protected by the Federal Constitution. As a further make-weight in favor of the decree, the court presents the argument that after the tide water is reached, the state becomes a riparian proprietor of the stream, and as such has the right of the proprietors on the running water to prevent the interception of water. We have sufficiently considered this in Point V except the suggestion that the fresh water is useful to help dilute the sewage in the tidal channel. This is an argument based on the police power of the state, and as pointed out in our Point I cannot be sustained because what is forbidden is not diversion, but only diversion to New York consumers, and such discrimination cannot be tolerated in the exercise of the police power by the state.

GILBERT COLLINS,
RICHARD V. LINDABURY,
*Counsel for Plaintiff in Error.*

January, 1908.

MacCrellish & Quigley, Book and Job Printers, Trenton, N. J.

# Supreme Court of the United S

October Term, 1907. No. 184.

Between
THE HUDSON COUNTY WATER COMPANY,
*Defendant-Appellant,*
and
ROBERT H. MCCARTER, ATTORNEY-GENERAL OF THE STATE OF NEW JERSEY,
*Informant-Respondent.*

On Appeal from Court of E and Appeals State of New

Brief on Behalf of the Informant-Respondent.

Robert H. McCarter, Attorney-General of New Jersey.

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## STATEMENT OF FACTS.

This is an appeal from a decree of the New Jersey Court of Errors and Appeals, the court of last resort in that State, affirming a decree of the Chancellor, awarding to the informant the relief prayed for in the information, and perpetually enjoining the Hudson County Water Company from carrying or transporting into Staten Island or the State of New York, or elsewhere out of the State of New Jersey, any of the waters of the Passaic river.

The suit was instituted by the Attorney-General and an amended information filed in the Court of Chancery of New Jersey on or about the nineteenth of September, nineteen hundred and five, alleging that a corporation of the State of New Jersey, known as the East Jersey Water Company, was engaged in the sale of water to municipal corporations and water companies, and to other consumers, taken from the Passaic river, and for that purpose had established extensive works at Little Falls, on said river and in said State, and was daily diverting from said river a quantity of water estimated at thirty million gallons, and that the demands of their customers in the State of New Jersey were increasing from year to year; that a corporation of the State of New Jersey, known as the Hudson County Water Company, the appellant herein, had entered into a contract with certain corporations located in Staten Island, in the State of New

York, to supply them with water, which, in turn, it had arranged to secure from the East Jersey Water Company by means of intermediate corporations; and had likewise entered into a contract with the city of New York for a supply of water from the same source into Staten Island, to be distributed by the municipal authorities of the said city of New York to consumers in the borough of Richmond, in Staten Island, and within the corporate limits of the city of New York, whereby it was proposed to supply to said city not less than three million gallons of water per day. That said last-mentioned contract had been made with full knowledge of the provisions of the act of the Legislature of the State of New Jersey approved May eleventh, nineteen hundred and five, entitled "An act to preserve and maintain the lakes, ponds, brooks, creeks, rivers and streams of this State, and to prevent the water thereof from being carried, by pipes, conduits, ditches or canals, into other States for use therein, and to authorize the Court of Chancery to assist in the observance of this act," and being Chapter 238 of the Pamphlet Laws of that year, whereby the Legislature, after reciting that the available waters of the fresh-water lakes, ponds, brooks, creeks, rivers and streams of the State of New Jersey do not increase with the growth of the population, and unless the same are carefully preserved, will become inadequate to perform their natural functions, which functions are essential to the health and prosperity of all the citizens of the State, enacted that it should be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh-water lake, pond, brook, creek, river or stream of the State of New Jersey into any other State for use therein, and making it the duty of the State Geologist to keep a general oversight over such sources of water supply, and see that the same are preserved for the use and benefit of the citizens and inhabitants of the State, and to prevent the waters thereof from being transported, in manner aforesaid, into other States for use therein; and requiring him, upon being informed that it is the intention of any person or corporation to so carry or transport into any other State for use therein, any such waters, through the Attorney-General, to apply to the Court of Chancery for an injunction to restrain the same, which Court was thereby empowered and authorized to entertain jurisdiction of such a suit in order to preserve the waters aforesaid for the use and benefit of the citizens and inhabitants of the State; and to that end the said Court was authorized to issue such restraining order and injunction, both preliminary and final, as may be necessary.

A full copy of this act is attached to this brief in the appendix,

and may likewise be found on page 461 of the Pamphlet Laws of the State of New Jersey for the year 1905.

The information further showed that the Passaic river is the principal and most important of all the available sources of supply of water to the cities and towns of New Jersey, and that the demand for water for use in the State of New Jersey is growing more rapidly than the population of the State, and that within a short time the entire supply of the Passaic river and its tributaries will be required for the uses of the people of the State; that the said Passaic river is also a natural outlet for the drainage that exists within its valley, and receives such drainage, including much fetid and unhealthy matter, and carries it to the sea; and that the maintenance of the normal quantity of water within its banks is necessary to prevent its further pollution. That several municipalities bordering near or upon the said river, by legislative authority or otherwise, are, and for a number of years past have been, emptying their sewage into the said river, and already the waters thereof have become greatly contaminated, and the health, comfort and prosperity of the good citizens living near or along its banks have become affected thereby, and are in danger of becoming more so, and that any further diversion of the waters of the Passaic river at Little Falls or elsewhere, for the purpose of transmission to the State of New York, will render the stream inadequate to carry such sewage, fetid matter or drainage into the sea, and will cause discomfort and disease to the inhabitants of the State who live or work near to or adjoining the said stream below the point of diversion; and that the proposed diversion will deprive the State and its citizens of large quantities of water which belong to the State by virtue of its sovereignty, as successor to the English crown, in the ownership at common law of all the waters of fresh-water streams, subject to the rights only of the riparian owners along said streams, and which, if undiverted in the manner proposed, would ultimately flow on to lands of and become the property of the State.

The information further pleaded the act of the Legislature above referred to, and prayed for the relief therein authorized and for an injunction.

An answer was filed by the Hudson County Water Company, practically admitting the facts averred in the information, but claiming the benefit of the contracts set out in the information, and denying that the act of the Legislature of the State of New Jersey, approved May eleventh, nineteen hundred and five, was applicable to it, and insisting that it was void because it impaired the obligation of said contracts, because it took property without

due compensation and without process of law, and provided for the interference of commerce between the States of New Jersey and New York, and denied to the citizens of other States the privileges of citizens of New Jersey, as well as the equal protection of the laws, and was, therefore, violative of the Federal Constitution.

After full hearing, as before stated, a final decree was entered, according the Informant all the relief desired, on the advice of VICE-CHANCELLOR BERGEN, in accordance with the opinion found in page 36 of the record. From this decree an appeal was taken to the Court of Errors and Appeals, resulting in a unanimous affirmance of that decree, the opinion of that Court being delivered by MR. JUSTICE PITNEY. This opinion is found on page 44 of the record.

The opinions of the Court of Chancery and of the Court of Errors and Appeals of the State Court are so luminous and convincing that the respondent could well rest his case upon their reasoning, and the Court is respectfully referred to those opinions as printed in the record, and no effort will be made in this argument to repeat what is therein included.

The appellant in its assignment of errors (record, page 65) places its right to review the decision of the court of last resort of the State of New Jersey in this Court, upon the fact that that decision sustained the act of the Legislature before referred to, the effect of which was to validate an act that should have been held to be void as an attempt to regulate, control or forbid commerce between the State of New Jersey and other states, and because of the other constitutional provisions referred to in the answer and hereinabove noted, including the claim that by virtue of the said decree, the Hudson County Water Company was denied the right and privilege to sell water taken from a running stream in New Jersey to citizens of New York, as fully and freely as to citizens of New Jersey, in violation of the provisions of the Federal Constitution, providing for the regulation, by the Congress exclusively, of commerce between the states, and also in violation of the provisions of the Constitution whereby the citizens of New York are entitled to the privileges and immunities of the citizens of New Jersey and the equal protection of the laws of New Jersey.

The Court will take judicial notice that the Passaic river is a fresh-water stream, flowing into the ocean through New York bay; and that at the point of diversion (Little Falls) it is not

navigable, but becomes so a short distance above the city of Newark.

*Brown* v. *Scofield, 8 Barb. 239.*
*Peyroux* v. *Howard, 7 Pet. 324.*
*The Montello, 11 Wall. 411.*
*U. S.* v. *Rio Grande Co., 174 U. S. 690.*

It nowhere appears in this case how, if at all, either the East Jersey Water Company or the Hudson County Water Company acquired their alleged right to divert water at Little Falls, and it must be assumed that, so far as lower riparian owners are concerned, including, of course, the State itself, these companies are mere interlopers or squatters. It is not even claimed that either of them is a riparian owner, so that the defendants, thus claiming to exercise the valuable right to divert large quantities of water of a running stream, bases its right so to do entirely upon squatter sovereignty, notwithstanding the fact that such conduct amounts, in law, to a nuisance, which any lower riparian proprietor can either enjoin, or sue to recover his damages.

*East Jersey Water Co.* v. *Bigelow, 31 Vr. (60 N. J. L.) 201.*

Even if the East Jersey Water Company were shown to be a riparian proprietor at Little Falls, its rights in the water of the river flowing thereby are perfectly well settled by rules too familiar to require any citation of authorities. Such an owner has a mere usufruct in the water as it flows by his property; he may gain the benefit of any power arising therefrom; he may divert it through his premises, provided he restore it again to the natural channel before it reaches the boundary of a lower proprietor. He may use it reasonably for domestic purposes, but he has no right to divert any substantial quantity and apply it to his own or other people's uses. The lower owner is entitled to have substantially the full amount of water flow by his land without dilution or diminution by or on the part of an upper proprietor. It is believed that no authority can be found which sanctions the right of the East Jersey Water Company to divert daily millions of gallons of water from the Passaic river at this or any other point without the consent of the lower owners, and to apply the same to municipal or other purposes.

*U. S.* v. *Rio Grande Co., 174 U. S. 690, 702.*

This familiar principle would be applicable if the East Jersey Water Company, on whose rights the defendant must of course rely, were a riparian proprietor. When it cannot even claim that right, it becomes all the more significant.

But the appellant, without seriously questioning the correctness of this axiomatic rule, denies that it here concerns the State in any way, and insists that this suit has no properly interested party to support it. In a word, it denies that the State has any interest in the premises, either at common law or by virtue of the statute above referred to, and claims that any rights sought to be given by that statute are unavailable against the defendant, by reason of the fact that it had, previous to the enactment, entered into contracts looking to the proposed diversion of the waters into the State of New York.

It thus appears that the fundamental question to be determined is whether or not the State is interested and can assert such interest in this manner.

What, then, is the interest of the State and what rights has it in the premises?

The correct answer to this inquiry is two-fold: the State, as successor to the Crown in England, is—

(*a*) The absolute owner of the bed of the stream and of the banks thereof up to high-water mark, so far as it is navigable.

*Stevens* v. *Paterson and Newark R. R. Co.*, *5 Vr. (34 N. J. L.) 532; Cobb* v. *Davenport, 7 Vr. (36 N. J. L.) 369;* and

(*b*) The rights of the private proprietors in the running stream above the point of navigability, whose title goes to the thread, being limited and usufructary only, the residue of interest or property in the great mass of running water resides in the State as trustee for the public, and the State has not only the right to preserve, but it is charged with the duty, as such trustee, of preserving the same for the common benefit of all its citizens.

## I.

### The State, as a Lower Owner, is Entitled to Preserve the Integrity of the Stream so that it will Come to it Unimpaired in Quantity.

This is but an example of the principles applied in *Attorney-General* v. *Delaware & Bound Brook R. R. Co.*, *12 C. E. Gr. (27 N. J. Eq.) 631*, where the court, through Mr. Justice Dixon, said:

> "In equity as in the law court, the Attorney-General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called civil information for their protection. The State is not left without re-

> dress in its own courts, because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility, and to whom, therefore, it has given the right of appearing on its behalf and invoking the judgment of the courts on such questions of public moment."

A leading case is *Attorney-General* v. *Jamaica Pond Aqueduct Corporation, 133 Mass. 361.*

Here an information was filed by the Attorney-General against a corporation claiming that Jamaica Pond was one of the great ponds of the commonwealth, and that the defendant by its charter and other statutes was authorized to draw water therefrom, provided it did not reduce the level below a certain limit, and that the defendant, claiming legislative authority, was about to erect water-works for the purpose of supplying a municipality with water, the effect of which would be, as the information claimed, to lower the level of Jamaica Pond below the limit fixed as aforesaid, thereby impairing the rights of the public in the use of the pond for fishing, boating and other lawful purposes.

The opinion, after determining that the Attorney-General had the power to restrain any corporation exercising *ultra vires* powers, continues:

> "There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances. The great ponds of the commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the commonwealth. The rights of fishing, boating, bathing and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. *West Roxbury* v. *Stoddard, 7 Allen 158. Attorney-General* v. *Woods, 108 Mass. 436. Commonwealth* v. *Vincent, 108 Mass. 441.* If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney-General to restrain and prevent the mischief.
>
> "Suppose a city or an aqueduct corporation commences a canal or an aqueduct, without authority from the Legislature, designed to draw off great quantities of the water, so as to injure or endanger the rights of the public therein, an information in equity would fur-

nish the only adequate means of ascertaining and protecting the rights of the government and of the public. The Legislature has the right to determine to what extent the defendant corporation may draw down the waters of Jamaica Pond for the purposes for which it was incorporated."

Another important case is *Coosaw Mining Co.* v. *South Carolina, 144 U. S. 550,* where an information on behalf of the State of South Carolina, filed to prevent the defendant corporation from improperly digging, mining and removing phosphate deposits in the navigable waters of the State, was sustained. Mr. Justice Harlan, after construing the legislation under which the defendant corporation was claiming the right, adversely to the company and in favor of the State, confirms the right of the State to equitable relief by injunction in the premises, and concludes:

> "The grounds of equity jurisdiction in such cases as the one before us are substantially those upon which courts of equity interfere in cases of waste, public nuisance and purpresture."

He then refers with approval to *United States* v. *Gear, 3 How. 120,* where a bill for injunction by the United States was sustained to prevent the digging of ore from lead mines upon the public lands; to *Attorney-General* v. *Forbes, 2 My. & Cr. 123,* where it was said by the Lord Chancellor:

> "Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has a well-established jurisdiction upon a proceeding, by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances."

Reference in the opinion is also made to *Gibson* v. *Smith, 2 Atk. 182,* and to *Attorney-General* v. *Jamaica Pond Aqueduct* (*supra*), at length, and it concludes as follows:

> "These principles are applicable to the present case. The remedy at law for the protection of the State, in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters, is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period, by obstructing

> others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law, as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is the security, for all time, against illegal interference with the control, by the State, of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw river. Such security was properly given by the decree below."

See, also, *Story's Eq. Jur., secs., 922, 923,* where it is stated that an information in equity at the suit of the Attorney-General is readily sustained by courts of equity, because of "their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief and also to suppress oppressive and vexatious litigation."

See, also, *Kerr on Injunctions, 262; 1 Joyce on Injunctions, 120.*

This whole subject was luminously discussed by this Court in the recent case of *Missouri* v. *Illinois and the Sanitary District of Chicago, 180 U. S. 208, 243,* in which the right of a state, through its Attorney-General or otherwise, to preserve the integrity or purity of its streams by bill for injunction, was maintained, and reliance had upon *Attorney-General* v. *Jamaica Pond Aqueduct Corporation (supra); Coosaw Mining Company* v. *South Carolina, 144 U. S. 550 (supra),* and other cases.

The damage or injury to a lower private riparian owner seeking an injunction in cases of this character need not be great.

*1 High on Injunctions, 795,* where the fact that such lower proprietor will suffer but small damage from the proposed diversion is said not to be any defense to an injunction.

To the same effect are—

*Hulme* v. *Schreve, 4 N. J. Eq. 116;*
*Shields* v. *Arndt, Id. 234;*
*Higgins* v. *Flemington Water Co., 9 Stew. 538;*
*Corning* v. *The Troy Iron and Nail Factory, 40 N. Y. 191.*

Mr. Angell, in his treatise on *Water Courses, sec. 135,* says: "That a diversion of a water course without actual injury to a riparian owner down the stream legally imports damages (because it is an infringement of a right), is a doctrine powerfully sustained by the American authorities."

See, also, *Mudge* v. *Salisbury, 110 N. Y. 413,* where, in a similar case by a private proprietor, the Court says:

> "Resort to equity by the plaintiffs was proper in this case. The jurisdiction of courts of equity and their power to grant relief cannot be doubted. The avoidance of a multiplicity of actions and the inadequacy of legal remedies to prevent the defendants from taking away the water, to the detriment of plaintiffs' prior rights thereto, and to secure to plaintiffs the continuous enjoyment, by them, of those superior rights, are deemed sufficient grounds for the interposition of a court of equity. (*Olmsted* v. *Loomis, 9 N. Y. 423; Corning* v. *Troy Iron Factory, 40 Id. 191.*)"

See, also, *Garwood* v. *N. Y. C. & H. R. R. R. Co., 83 N. Y. 400; Weiss* v. *Oregon Iron and Steel Co., 11 Pac. Rep. 255.*

If this minimum of damage suffice to support a private suit for an injunction by a private owner, *a fortiori* will it suffice in this case, where the information is by the Attorney-General. The allegations of the information, to the effect that the proposed diversion will not only deprive the State and its citizens of large quantities of water, but will cause discomfort and disease to the inhabitants of the State, and interfere with the functions of the stream which are essential to the health and prosperity of its citizens, are either undenied or admitted in the answer, as shown by the opinions. If the proposed diversion is permitted, then more discomfort and disease will follow. The defendant or other corporations, encouraged by a refusal of the court to act at this time, would erect expensive plants and rely upon the cost thereof as a reason to prevent future interference by the State. The principle that the State can prevent waste or destruction of its property does not require it to wait until they have assumed large proportions. The court should encourage alertness on the part of the public in these matters, and its Attorney-General, while ever on the alert to protect the property of the State, should not be required to wait until he is met by the claim of laches, or of large expenditure, but should act promptly, and the fact that little or no present damage to the State is shown should not, by the courts, be permitted to be interposed as a defense.

It must not be overlooked that individuals may acquire, by prescription against the Crown or the State, the right to the soil of public waters and hence prescriptive rights might be set up as against the State.

As shown by this court in *Missouri* v. *Illinois, 200 U. S. 496, 520,* time in the acquisition of rights may sometimes run against a state; and it is hence of importance to a state to prevent the acquisition of title by prescription.

See *Gould on Waters, sec. 37,* and the cases cited in support of this doctrine, including *Hale, De jure maris, chapter 5.*

*Oppenheim, International Law, sec. 243;*
*Hargrave's Law Tracts, 18;*
*Nichols* v. *Boston, 98 Mass. 30;*
*Boston* v. *Richardson, 105 Mass. 41;*
*George* v. *Meeker, 34 Conn. 31;*
*Palmer* v. *Hicks, 6 Johns. 133;*
*2 Kents Com. 427.*

## II.

THE STATE, WITHOUT REGARD TO ITS LOWER PROPRIETORSHIP, IS ENTITLED TO AN INJUNCTION AS SUCCESSOR TO THE CROWN AND AS REPRESENTATIVE OF THE PUBLIC; AND THIS TOO NOTWITHSTANDING THE PROVISIONS OF THE FEDERAL CONSTITUTION RELIED UPON BY THE APPELLANT.

It is believed that the State has a supervisory interest and property in the waters that lie or flow in it, entitling and requiring it, as the representative of the public, to preserve the same, and that this right and duty have been inherited from the King of England.

In *Hargrave's Law Tracts, chap. 2,* is a consideration of the right of prerogative of the King in private or fresh rivers, and it is there stated that the King, by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even when the sea doth not flow and reflow, among which are an interest of jurisdiction, namely, in reference to common law nuisances in and by rivers, as when the sewers were not kept. That this gave rise to the commission of sewers, as well for fresh rivers as for salt, *vide 23 H. 8 chap. 5,* where in the act of parliament appointing a commission to look after the sewers that flowed into and through the public fresh water streams of the kingdom, it was recited for that " by reason of our royal dignity and prerogative royal, we are bound to provide for the safety and preservation of our realm."

Another part of the King's jurisdiction in reference to nuisances is there stated to be to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, and among the nuisances mentioned, page 9, are "the polluting of the rivers by cuts or trenches." In Chapter V, there is a consideration of the rights which a subject may have in the creeks or arms of the sea, and on page 23, reference is made to *1 H. 4, chap. 12,* whereby it was enacted "that there shall be commissions

granted to survey and keep the waters and great rivers, and to correct and amend the default."

In *Smith v. Rochester, 92 N. Y. 463–477,* is found a philosophical statement of the true rule. I quote as follows:

> "Among other rights which pertain to sovereignty is that of using, regulating and controling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water. The right is known as the *jus publici* and is deemed to be inalienable.
>
> "Judge Edmonds, in his learned opinion in *Gould* v. *Hudson River Railroad Co., 6 N. Y. 546,* says: 'When regarding the rights of the State in respect to lands, we must not be unmindful that it has two interests, one governmental and the other proprietary. Or as it is divided by M. Prudhon in his *Traite du Domain Public,* the public domain, which is that kind of property which the government holds as mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, etc., and which are not, of course, alienable; and the domain of the State, which applies only to things in which the State has the same absolute property as an individual would have in like cases.' Although this quotation is from a dissenting opinion, yet, so far as the principle announced is concerned, it met with no dissent and is supported by universal authority. *6 N. Y. 555; U. S. B'k* v. *B'k of Metropolis, 15 Pet. 387; Doe dem Knight* v. *Nepean, 5 B. & A. 91; Hoyt* v. *Sprague, 12 Pick. 407; 3 Kent's Com. 537; Pollard's Lessee* v. *Hagan, 3 How. U. S. 222.*
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> "In the examination of any of the numerous questions relating to water-courses that may arise, no discussion would be complete which failed to refer to the ancient and learned treatise *De jure Maris,* by Sir Matthew Hale, and which, after the lapse of two centuries, remains the most concise, comprehensive and reliable work on the subject of which it treats. As appears from the learned note of Judge Cowen to *ex parte* Jennings (*6 Cow. 537*), under the following title, 'Of the right of prerogative in private or fresh rivers,' it reads: 'The king, by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea does not flow or reflow, as well as salt or arms of the sea, and those are these which follow:
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> "'1st. A right of franchise or privilege that no man may set up a common ferry for all passengers without

prescription time out of mind or a charter from the king.

"'2d. An interest, as I may call it, of pleasure or recreation.

"'3d. An interest of jurisdiction.

"'And another part of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also of smaller, as barges and boats, to reform the obstructions or annoyances that are therein to such common passage, for as the common highways on the land are for the common-land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water, and as the highways by land are called *altæ viæ regiæ*, so these public rivers for public passage are called *fluvie regales* and *streomes le Roy;* not in reference to the propriety of the river, but to the public use.'"

An intelligent consideration of the subject will also be found in sections 133, 138, 138*d*, 140*a* and 141 of *Farnham* on Waters.

In *Connecticut River Lumber Co.* v. *Alcott Falls Co., 65 N. H. 290, 21 Atl. Rep. 1090,* an application by the Attorney-General to prevent the erection of a dam in the Connecticut river which would interfere with the easy flotation of logs thereon, was upon this ground, sustained by the Supreme Court of New Hampshire.

Upon the same theory the Supreme Court of Indiana, in the case of *State* v. *Ohio Oil Co., 150 Ind. 21, 49 N. E. Rep., p. 809,* sustained an application by its Attorney-General for an injunction to prevent the waste of natural gas by the defendant, which was drilling for oil.

There the whole subject of the right of the State, as the representative of the public, to protect the public interest in the common property, like gas or water, is considered in a very elaborate opinion, and the right to an injunction expressly sustained upon the ground that it is the duty of the State, where the common property of the people at large is being wasted, destroyed, misapplied, or injured, to interfere, likening the principle to legislation concerning fish, or to prevent a nuisance in public streams. The language of the Supreme Court of Kansas, in *State* v. *Garfield, 28 Kan. 726,* is adopted, to the effect that:

"Anything which is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community

> or neighborhood, or any considerable number of persons, is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right to ownership of which is in the people of the State, as in England it was in the king, and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other State in the Union."

Elaborate quotations are then made from several other cases, including that of *Attorney-General* v. *Aqueduct Corporation, 133 Mass. 361* (*supra*), and *Coosaw Mining Co.* v. *South Carolina, 144 U. S. 566* (*supra*).

Practically the same subject was considered by this Court in the case of *Ohio Oil Co.* v. *Indiana, 177 U. S. 190,* where it sustained legislation of the State of Indiana making it unlawful for any person, being in possession of a natural gas or oil well, to permit the flow of gas or oil from any such well to escape into the open air, without being confined for a longer period than two days next after such oil or gas shall have been struck, and held that legislation of that character in no way interfered with private property, nor did it amount to a denial of due process of law.

The opinion is a philosophical one by MR. JUSTICE WHITE, and can only be fully appreciated by being read *in extenso*.

It determines that oil and gas embodied in the bowels of the earth occupy in law a position somewhat the same as water, and concludes that the three may be characterized as minerals *feræ naturæ*.

It says:

> "Water and oil, and, still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract was uncertain,' as said by Chief Justice Agnew in *Brown* v. *Vandergrift, 80 Penn. State 147, 148.* They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

After adverting to the right of the State to protect animals *feræ naturæ*, the opinion continues:

> "Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana, which is here attacked, because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument, upon which the attack on the statute must depend, involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession a right of property in them, in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction."

The decree of the highest court of the State of Indiana sustaining the right of that State through its Attorney-General to enjoin the waste of natural gas was therefore sustained by this Court, and that alone upon the theory that the State has a duty and right to protect property of this kind within it, which belongs to no one particular person, but is given to all. Surely the interest which the owner of the soil has, by virtue of his title *usque ad inferos* to the gas or oil that is in it, is as great as the right of the private owner of riparian land to the water flowing through it, and if the State, as settled by this high authority, can legitimately protect the common interest which the people at large have in the gas or oil thus located, and before it is specifically appropriated, a similar right must reside in the sovereign to protect the common right in the waters of the State.

This court, in *Kansas* v. *Colorado, 185 U. S. 125*, had occasion to consider its jurisdiction and right to maintain a suit by or on behalf of a state to prevent the pollution or disturbance of fresh water streams running through its boundaries, and in the course of its opinion said:

> "The mere fact that a state has no pecuniary interest in the controversy would not defeat the original juris-

diction of the Court which might be invoked by the state as *parens patriæ*, trustee, guardian or representative of all or in considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justifiable under the constitution.

In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens, and injury to their health and comfort."

See also *Missouri* v. *Illinois and the Sanitary District of Chicago, 180 U. S., 208.*

It is exactly this theory that promoted the suit at bar.

Precisely the same view was announced by this court in the very recent case of *Kansas* v. *Colorado, 206 U. S. 46, 99,* in which, after quoting from *Missouri* v. *Illinois* (*supra*), MR. JUSTICE BREWER referred to the action there pending, in which the State of Kansas undertook to enjoin the State of Colorado from diverting the waters of the Arkansas river, and sanctioned the right of the State, as complainant, to invoke injunctive relief, saying:

"It (Kansas) is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint * * *"

and MR. JUSTICE HOLMES, in the important case of *Georgia* v. *Tennessee Copper Co., 206 U. S. 226, 237,* thus expresses the same idea.

"The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This

> is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads."

Now, it is upon this theory that from time immemorial game and fish laws have been sanctioned.

In *Allen* v. *Wyckoff, 19 Vr. (48 N. J. L.) 90,* Justice Dixon says:

> "As a game law the statute falls into the line of a long series of enactments, beginning in the very early history of the mother country and continuing uninterruptedly down to the present time."

And if the decisions of the Court in regard to those statutes be examined, it will be found that the Supreme Court of Illinois, in the case of *Magner* v. *The People, 97 Ill. 333,* correctly says:

> "The ownership (of the game) being in the people of the State—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare."

See also *American Express Co.* v. *The People (Sup. Ct. of Ill), 24 N. E. Rep. 758.*

I can see no distinction whatever in principle between the reserved right of the State to protect the common interest in that mineral that is *ferœ naturæ,* and animals like game that are *ferœ naturæ;* and continuing the analogy, inasmuch as statutes have been enacted in almost every State regulating the times when game shall be shot or fish caught, and applying a different rule to non-residents from that which is permitted to residents, which statutes have been constantly sustained as being a proper exercise of the police power and in no way amenable to the criticism that they contravene the Federal Constitution as interfering with commerce, it would seem that chapter 238 of the Laws of 1905 (*supra*) is entirely valid legislation.

A leading case is that of *State* v. *Geer*, decided by the Court of Errors of Connecticut and reported in *61 Conn. 144*.

There the validity of an act of the Connecticut Legislature, the first section of which forbade the killing of woodcock, etc., for the purpose of conveying the same beyond the limits of the State, and the second section of which forbade any person or corporation to transfer or convey beyond the limits of the State any such woodcock, etc., killed within the State, was questioned. The defendant had been convicted of violating this act and appealed from such conviction upon the ground that it was an invalid piece of legislation. The following quotation from the opinion may well be studied:

> "The defendant further demurred to the complaint '(3) because section 2546 of the General Statutes is unconstitutional and void so far as it may be construed to forbid the transporting from the State, or having possession of such birds with intent to procure such transportation to another State, birds described therein, which birds have been sold to parties in such other State, and have begun to move as an article of interstate commerce; and (4) because it is made to appear in said complaint that the defendant is guilty under said section, if such birds were bought by the defendant in the markets of this State as merchandise and commerce, and had begun to move as an article of commerce.' In short, the defendant insists that the statute, as construed by us, is unconstitutional, as restricting inter-state commerce, and refers to *Robbins* v. *Taxing Dist., 120 U. S. 469, 7 Sup. Ct. Rep. 592; The Daniel Ball* v. *U. S., 10 Wall. 566; Railroad Co.* v. *Husen, 95 U. S. 465; State* v. *Saunders, 19 Kan 127; Territory* v. *Evans (Idaho), 23 Pac. Rep. 115; Territory* v. *Nelson, Id. 116; State* v. *Mining Co. (Indiana Sup.), 22 N. E. Rep. 778;* and *Express Co.* v. *People (Illinois Sup.), 24 N. E. Rep. 759.* In *State* v. *Saunders, 19 Kan. 127,* the Court says it seems to be finally settled, among other things, that no State can pass a law which will directly interfere with the free transportation from one State to another, or through a State, of anything which is or may be subject to inter-state commerce; that a law which prohibits the catching and killing of prairie chicken may be valid, although it may indirectly prevent the transportation of such chickens from the State to any other State; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic

and commerce, and at the same time directly prohibits their transportation from the State, is unconstitutional and void. Without stopping to consider the construction which was given to the constitutional provision under discussion by the earlier commentators, except to suggest, in the language of Judge Story (*2 Story, Comm. 511*), that a very material object of its adoption was the relief of the States which export and import through other States from the levy of improper contributions on them by the latter—an object which was shown to be important by the experience of the States during the confederation period—we feel constrained to hold the provision of the statute to be constitutional. It being conceded that the State, under its general police power, may lawfully prohibit the killing of the game birds in question, it may, of course, control such killing, and the times and purposes thereof. It may lawfully enact that they may be killed and sold and held for sale only for domestic consumption. The State, in the exercise of its power, instead of prohibiting the killing altogether, permits the person killing them to acquire only a qualified right in them, namely, the right to appropriate them to his own use, and the right to sell or transport them for domestic use. *The birds in question never become articles of commerce within the meaning of the term contended for by the defendant. They became private property of a qualified character.* The law limited the purposes for which they might be killed and become private property. The difference between property of this sort and the ordinary private property of commerce is obvious. The apparent assumption of the Kansas court, above referred to, that game which the law allows to be caught and killed, thereby necessarily becomes the subject of traffic and commerce, meaning inter-state commerce, appears to us unsound. If the proposition were true, then the conclusion that a State law interfering with such commerce would be unconstitutional might pass unquestioned. But we cannot acquiesce in a decision which would deny the power of the State to limit the right to kill, sell and hold its own game by any provision short of an absolute prohibition, without thereby transforming it into that species of property the transportation of which from the State it is unconstitutional to prohibit."

The case was then appealed to this Court, and affirmed in an opinion written by Mr. Justice WHITE and reported in *161 U. S.*

519, who states that the charge against the defendant was "the possession of game birds for the purpose of transporting them beyond the State, which birds had been lawfully killed within the State."

He passes to a consideration of the constitutionality of the statute creating the liability, and says: "The solution of the question involves a consideration of the nature of the property in game and the authority which the State had a right lawfully to exercise in relation thereto."

He then continues:

> "Among other sub-divisions, things were classified by the Roman law into public and common. The latter embraced animals *feræ naturæ* which, having no owner, were considered as belonging in common to all the citizens of the State. After pointing out the foregoing sub-division, the Digest says:
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> "'There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. 1. Thus all the animals which can be taken upon the earth, in the sea or in the air, that is to say, wild animals, belong to those who take them. * * * Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purposes to do so.' *Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.*
>
> "No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited. *Institutes, Book 2, Tit. 1, s. 12.*
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> "This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the State of its undoubted authority *to control the taking and use of that which belonged to no one in*

*particular, but was common to all.* In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *ferœ naturæ* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control. *Merlin, ubi sup.,* mentions the fact that, although tradition indicates that from the earliest day in France every citizen had a right to reduce a part of the common property in game to ownership by possession, yet it was also true that as early as the Salic law that right was regulated in certain particulars. Pothier, in his treatise on property, speaks as follows:

"'In France, as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who, being in *naturali laxitate,* belong to no person in particular. The sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons. Some ancient doctors have doubted if sovereigns had the right to reserve hunting to themselves and to forbid it to their subjects. They contend that, as God has given to man dominion over the beasts, the prince had no authority to deprive all his subjects of a right which God had given them. The natural law, say they, permitted hunting to each individual. The civil law which forbids it is contrary to the natural law and exceeds, consequently, the power of the legislator, who, being himself submitted to the natural law, can ordain nothing contrary to that law. It is easy to reply to these objections. From the fact that God has given to human kind dominion over wild beasts, it does not follow that each individual of the human race should be permitted to exercise this dominion. The civil law, it is said, cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; but the civil law can restrict that which the natural law only permits. The greater part of all civil laws are nothing but restrictions on those things which the natural law would otherwise permit. It is for this reason, although by the pure law of nature, hunting was permitted to each individual, the prince had the right to reserve it in favor of certain persons and forbid it to others. *Pothier, Traite du Droit de Propriete, Nos. 27-28.*

"The right belongs to the king to hunt in his dominion; his quality of sovereign gives him the authority to take possession above all others of the things which belong to no one, such as wild animals; the lords and those who have a right to hunt hold such right but from his permission, and he can affix to this permission such restrictions and modifications as may seem to him good.' *No. 32.*

"In tracing the origin of the classification of animals *ferœ naturæ*, as things common, Pothier moreover says:

"'The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the other, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community.' *No. 21.*

"Referring to those things which remain common, or in what he qualified as the negative community, this great writer says:

"'These things are those which the juris consults called *res communes*. Marcien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores. * * * As regards wild animals, *ferœ naturæ*, they have remained in the ancient state of negative community.'

"In both the works of Merlin and Pothier, *ubi sup.*, will be found a full reference to the history of the varying control exercised by the law-giving power over the

right of a citizen to acquire a qualified ownership in animals, *feræ naturæ*, evidenced by the regulation thereof by the Salic law, already referred to, exemplified by the legislation of Charlemagne, and continuing through all vicissitude of governmental authority. This unbroken line of law and precedent is summed up by the provisions of the Napoleon Code, which declare *(Arts. 714, 715)*: 'There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws.' Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. Saint Joseph Concordance, vol. 1, p. 68.

"The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

"Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right. *2 Bl. Com. 1 and 12.*

"Referring especially to the common ownership of game, he says:

" 'But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air and water, which a man may occupy by means of his windows, his gardens, his mills and other conveniences; such also are the generality of those animals which are said to *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure.' *2 Bl. Com. 14.*

" 'A man may lastly have a qualified property in animals *feræ naturæ, propter privilegium;* that is, he may have the privilege of hunting, taking and killing them in

exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty this qualified property ceases. * * * A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which last so long as they are in actual use and occupation, but no longer.' *2 Bl. Com. 394.*

* * * * * *

"Undoubtedly this attribute of government to control the taking of animals *ferœ naturæ,* which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with or restrained by the rights conveyed to the Federal government by the Constitution. Kent, in his Commentaries, states the ownership of animals *ferœ naturæ* to be only that of a qualified property. *2 Kent Com. 347.* In most of the States laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. *Commonwealth* v. *Hall, 128 Mass. 410; Commonwealth* v. *Wilkinson, 139 Penn. St. 304; People* v. *O'Neil, 71 Michigan 325.* There are also cases where the validity of some particular method of enforcement provided in some of the statutes has been drawn in question. *Kansas* v. *Saunders, 19 Kansas 127; Territory* v. *Evans, 2 Idaho 634.*"

After quoting with approval several cases, including *Allen* v. *Wyckoff* (*supra*), the opinion continues:

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not

as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this Court in *Martin* v. *Waddell, 16 Pet. 410*, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the State, is thus stated in a well considered opinion of the Supreme Court of California:

" 'The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.' *Ex parte Maier, ubi sup.*

" 'The same view has been expressed by the Supreme Court of Minnesota, as follows:

" 'We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common.' *State* v. *Rodman, ubi sup.*

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders

to take game, to dispose of it, and thus cause it to become an object of State commerce; as a resulting necessity such property has become the subject of inter-state commerce, and is hence controlled by the provisions of article 1, section 8, of the Constitution of the United States. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State is allowed, that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership, which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of inter-state commerce, and therefore under the control of the Constitution of the United States. The distinction between internal and external commerce and inter-state commerce is marked, and has always been recognized by this Court."

The opinion of CHIEF JUSTICE MARSHALL, in *Gibbons* v. *Ogden, 9 Wheat.*, to the effect that there is a great distinction between internal commerce and the commerce among the States, is referred to at length, and the Judge continues:

"The fact that internal commerce may be distinct from inter-state commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the State law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external com-

merce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce."

He quotes with approval a large excerpt from the opinion of the Supreme Court of Illinois, in *Magner* v. *The People* (*supra*), as follows:

> "It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence by implication it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State. But, in any view, the question of individual enjoyment is one of public policy and not of private right."

And after disapproving of the only two cases known to exist in this country holding to the contrary, viz., *State* v. *Saunders*, *19 Kan. 127*, and *Territory* v. *Evans*, *2 Idaho, 634*, *23 Pac. Rep. 115*, he concludes:

> "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people, which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so inter-state commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, *128 U. S. 1*; *Hall* v. *De Cuir*, *95 U. S. 485*; *Sherlock* v. *Alling*, *93 U. S. 99*, *103*; *Gibbons* v. *Ogden*, *9 Wheat. 1*. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. *Phelps* v. *Racey*, *60 N. Y. 10*; *Ex parte Maier*, *ubi sup*; *Magner* v. *The People*, *ubi sup.*, and cases there cited. The exercise by the State of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts*, *155 U. S. 461*, *473*. The power of a State to protect by adequate police regulation its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely

affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

A careful consideration of the foregoing opinion seems to me to make plain the identity of the right and interest of the State in animals *feræ naturæ*, and in water or other elements belonging to the community at large.

Every argument that is adduced in favor of legislation applying to game laws will support the legislation here under review.

If any additional cases are needed to support the foregoing authoritative decision of this Court, it will be found in the following:

*State* v. *Northern Pacific Express Co., 58 Minn. 403; Ex parte Maier, 103 Cal. 476, 37 Pac. Rep. 402; People* v. *O'Neil, 110 Mich. 324, 68 N. W. Rep. 227; Roth* v. *The State, 51 Ohio St. 209, 37 N. E. Rep. 259; State* v. *Medbury, 3 R. I. 138.*

See also an important series of cases supporting legislation in the State of Massachusetts, regulating the time and manner of taking fish in the sea within the territorial limits of the State, and holding that the same is equally binding upon residents and non-residents thereof. *Dunham* v. *Lamphere, 3 Gray 268*, expressly affirmed in *Commonwealth* v. *Manchester, 152 Mass. 230, 25 N. E. Rep. 113*, which in turn is affirmed by this Court in *sub nom. Manchester* v. *Massachusetts, 139 U. S. 240.*

The opinion of Mr. Justice Washington in *Corfield* v. *Coryell, 4 Wash. C. C. Rep., at page 371*, is the basis of all the law upon this subject. Speaking of the grant in the Federal Constitution of the right of Congress to regulate commerce, this opinion says:

"But this grant contains no cession, either express or implied, of territory, or of public or private property. The *jus privatum* which a State has in the soil covered by its waters is totally distinct from the *jus publicum* with which it is clothed. The former, such as fisheries of all descriptions, remain common to all the citizens of the State to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use. 'Over these,' says Vattel, b. 1, c. 20, sec. 235, 246, 'sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used.' 'He may make such regulations respecting hunting and fishing, as to

seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods.'" Vattel, b. 1, c. 20, sec. 248. The *jus publicum* consists in the right of all persons to use the navigable waters of the State for commerce, trade and intercourse, subject, by the Constitution of the United States, to the exclusive regulation of Congress.

"If, then, the fisheries and oyster beds within the territorial limits of a State are the common property of the citizens of that State, and were not ceded to the United States by the power granted to Congress to regulate commerce, it is difficult to perceive how a law of the State regulating the use of this common property, under such penalties and forfeitures as the State Legislature may think proper to prescribe, can be said to interfere with the power so granted. The act under consideration forbids the taking of oysters by any persons, whether citizens or not, at unseasonable times and with destructive instruments, and for breaches of the law prescribes penalties in some cases and forfeitures in others. But the free use of the waters of the State for purposes of navigation and commercial intercourse is interdicted to no person, nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the State."

The learned Judge then passes to a consideration whether the legislation there under review which prohibited any person who was not at the time an actual inhabitant and resident in the State, to rake or gather clams, oysters or shells in any of the rivers, bays or waters of this State, under a penalty, could be deemed to militate against the provision of the Federal Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, upon which point the learned Judge says:

"A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams and the like, is as much the property of the individual to whom it belongs as dry land, or land covered by water, and is equally protected by the laws of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the State. It is the property of all, to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property, and they are so exclusively entitled to the

use of it that it cannot be enjoyed by others without the tacit consent or the express permission of the sovereign who has the power to regulate its use.

"This power in the legislature of New Jersey to exclude the citizens of other States from a participation in the right of taking oysters within the waters of that State was denied by the plaintiff's counsel upon principles of public law, independent of the provision of the constitution which we are considering, upon the ground that they are incapable of being appropriated until they are caught. This argument is unsupported, we think, by authority. Rutherfoth, b. 1. ch. 5, secs. 4 and 5, who quotes Grotius as his authority, lays it down that, although wild beasts, birds and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other person can claim the liberty of hunting, fishing or fowling on lands or waters which are so appropriated. 'The sovereign,' says Grotius, b. 2, ch. 2, sec. 5, 'who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean other than subjects or citizens of the State from taking them).'

That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State, in express terms, to the United States, is admitted by the counsel for the plaintiff, and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the State, for the use of the citizens thereof, it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of co-tenancy in the common property of the State to the citizens of all the other States. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to the State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States

> from taking them, except under such limitations and restrictions as the laws may prescribe."

Following this doctrine, this Court, in *McCready* v. *Virginia, 94 U. S. 391,* applied a similar principle to legislation of the State of Virginia, confining to its citizens the right to plant, cultivate and dig oysters upon the public waters of that State, and held that the federal right to regulate commerce was in no way interefered thereby, upon the ground that the property belonged to the people at large, and that the commerce clause in the Federal Constitution was never meant to apply to the common property of the citizens of any State.

The State may confine to its own citizens the right to share in or enjoy the common property belonging to all of its citizens, just as it may so confine the delegation of its sovereign power to exercise the right of Eminent Domain; and no provision of the Federal Constitution prevents it. *Consumers' Gas Trust Co.* v. *Harliss (Sup. Ct. of Ind.), 29 N. E. Rep. 1062.*

The New Jersey courts, in *State* v. *Corson, 38 Vr. (67 N. J. L.) 178,* and *State* v. *Lee, 57 Atl. Rep. 142,* affirmed *59 Id. 1118,* also affirmed in this Court, October Term, 1907, have announced the same doctrine; and in *Haney* v. *Compton, 7 Vr. (33 N. J. L.) 507,* after elaborate argument by distinguished counsel, sustained the seventh section of an act of the New Jersey Legislature for the preservation of clams and oysters, which prohibited the raking or gathering of oysters *in any of the waters of this State* by any person who is not at the time and has not been for six months then next preceding an actual inhabitant and resident of this State, holding that it was not either an interference with commerce or a deprivation of citizens of other States of all the privileges and immunities of citizens of this State.

The theory underlying all these cases is that the commerce clause of the Constitution only applies to such commodities as are properly the subject of commerce, and that the fish, game or other animals *ferœ naturæ* of the State belonging to the community at large, are not articles of commerce.

In *State* v. *Northern Pacific Express Co. 58 Minn. 403, 59 N. W. Rep. 1100,* the Supreme Court of Minnesota said:

> "On the second question the defendant's contention is that the provisions of the act prohibiting the shipment out of the State of fish caught within the State, unlawfully interferes with interstate commerce. The complete answer to this is that the fish had never become articles of commerce."

See, also, a very instructive opinion of the Supreme Court of Alabama, in *State* v. *Hærub, 95 Ala. 176, 10 S. Rep. 752,* where the congressional right over interstate commerce is shown to

be confined entirely to such articles as have become the subject of trade, and do not belong to the people in their common right, and which are therefore altogether subject to such legislation as the State may desire in reference thereto.

That legislation of this character has been thus constantly sustained, not solely upon the theory that oysters are planted upon the soil of the State, appears both from the universal character of some of the laws, applying as they do to all the waters of the State, as well as from the fact that many of the cases apply to fish found in the private streams and lakes of the State, and to game flying through the air.

The fact is that the fallacy in the contention of the defendant that this act interferes with commerce, lies in the assumption that the water of the State of New Jersey, which it appears without right to have appropriated, is in no way a commodity or article of commerce. It is like the fish that swim in the waters or the fowls that fly above them. If the State, by reason of its ownership as representative of the public, can preserve the fowls of the air and the fish of the sea, *a fortiori*, must it be able to preserve the waters in which the fish swim, and in which no one has a private interest beyond a mere usufruct.

If the State has enough interest in its waters to protect them from contamination or pollution [*State Board of Health* v. *The Diamond Mills Paper Co., 18 Dick. (63 N. J. Eq.) 111*, affirmed *19 Id. (64 N. J. Eq.) 793*], it would seem that it could also preserve its quantity as well.

To permit of the abstraction of large quantities of water results in a pollution of the residue quite as effectively as does the pouring into the unreduced quantity of obnoxious matter.

In this connection the case of *Commonwealth* v. *Russell, 172 Pa. St. 506, 33 Atl. Rep. 709*, is significant, where it was held that the public was so interested in the maintenance of a pure water supply that the State could properly unite in a suit with a water company to prevent the pollution of a stream.

It is because of the failure to properly apprehend the exact status of running water in a stream of the State that the case of *State (ex rel. Corwin, &c.)* v. *Indiana, &c., Oil Co., 120 Ind. 575, 22 N. E. Rep. 778*, relied on by the appellant, is really inapplicable. For, as is distinctly shown in that case, natural gas, after it is collected from the bowels of the earth, is a well-recognized commodity and article of commerce, and no one can prevent its being gathered and sold; and that decision was put expressly upon that ground, and also contains the following important statement:

> "The act does not assume to provide for the safety, health or comfort of the citizens, but its object is to pre-

> vent the sinking of gas wells and the laying of pipe lines by persons who desire to convey gas out of the State. It is not a regulation of the mode of procuring, transporting or using natural gas designed to secure the health, safety or comfort of the citizens of Indiana. * * * The act cannot be taken out of the operation of the Federal decisions upon the theory that it is a valid exercise of the police power resident in every sovereign State, for the theory is without foundation."

A moment's reflection upon the law under consideration convinces that it is passed as a part of the police power of the State, and as such is consequently free from any of the constitutional objections that are here sought to be raised against it.

*Jones* v. *Brim, 165 U. S. 180.*
*P. R. R.* v. *Hughes, 191 U. S. 477.*
*Field* v. *Barber Asphalt Co., 194 U. S. 623.*
*Cleveland, &c., Co.* v. *Illinois, 177 U. S. 514.*

As was well said by this court in the very recent case of *Cook* v. *Marshall County, 196 U. S. 261, 272,* speaking of the power reserved to Congress by virtue of the commerce clause in the U. S. Constitution:

> "But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interferences of the States, forbids its employment as a sword to assail measures designed for the preservation of the public health, morals and comfort."

And while it is conceded that it is the ultimate province of the court, and not of the legislature, to determine whether any piece of legislation is or is not a valid exercise of the police power, yet the court will never interfere with legislation of this character designed to preserve the health, prosperity, comfort and safety of its citizens, without the greatest hesitation, and then only when it is very plainly not an exercise of that power.

*Dobbins* v. *Los Angeles, 195 U. S. 233*

In this connection the recent case of *Jamieson* v. *Indiana Natural Gas and Oil Co., 128 Ind. 555, 28 N. E. Rep. 76,* is significant, and should be compared with the earlier case of *State (ex rel. Corwin)* v. *Indiana, &c., Oil Co. (supra)*, so strongly relied on by the defendant.

Obviously, therefore, the respondent can claim no benefit from the fact that previous to the enactment of this law it had made some very minor contracts (not the most important one with the city of New York), for the transmission of a portion of this water to some railroads for consumption in the State of New

York. The State had no knowledge of any such contracts. They are based upon no right, residing either in the East Jersey Water Company or the Hudson Water Company, and amount to nothing more than an assertion by a mere squatter, that the government cannot protect its own, because such squatter has contracted with third persons in regard to the land squatted upon. Such contracts, if good until attacked by the State, were made expressly subject to the reserved police power of the State, and defendant's position is in no way improved thereby. The other, and only important contract—that made with the city of New York—was admittedly entered into after the enactment of the statute in question.

Nature's first law of self-preservation justifies the resort of the State at this time to the courts for protection.

The growth of our cities, which is ever increasing, makes the steadily-decreasing quantity of water in the streams which permeate our State, a menace.

We in New Jersey know of no rule which justifies the tapping of our streams by private money-making enterprises and the carrying the waters thereof in quantities to suit themselves, utterly regardless of our rights or interests, into other States, there to satisfy the thirst or demands of other consumers.

It is respectfully insisted that the decree below was in all respects correct and should be affirmed.

Trenton, N. J., February 25, 1907.

ROBERT H. McCARTER,

*Attorney-General of New Jersey, for Informant.*

# APPENDIX.

(COPY OF CHAPTER 238 OF THE LAWS OF 1905.)

AN ACT TO PRESERVE AND MAINTAIN THE LAKES, PONDS, BROOKS, CREEKS, RIVERS AND STREAMS OF THIS STATE, AND TO PREVENT THE WATERS THEREOF FROM BEING CARRIED BY PIPES, CONDUITS, DITCHES OR CANALS INTO OTHER STATES, FOR USE THEREIN, AND TO AUTHORIZE THE COURT OF CHANCERY TO ASSIST IN THE OBSERVANCE OF THIS ACT.

WHEREAS, The available waters of the fresh water lakes, ponds, brooks, creeks, rivers and streams of this State do not increase with the growth of population, and unless the same are carefully preserved, will become inadequate to perform the functions they were by nature designed to do, which functions are essential to the health and prosperity of all the citizens of this State; therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein.

2. It shall be the duty of the State Geologist to keep a general oversight over the fresh water lakes, ponds, brooks, creeks, rivers and streams of this State, and to see that the same are preserved for the use and benefit of the citizens and inhabitants of this State, and to prevent the waters thereof from being carried or transported by pipes, conduits, ditches or canals into other States for use therein; upon its being brought to his knowledge that it is the intention of any person or corporation to so carry or transport into any other State for use therein, the waters of any such fresh water pond, lake, brook, creek, river or stream of this State, it shall be his duty, through the Attorney-General, to apply to the Court of Chancery for injunction to restrain the same, and the Court of Chancery is hereby authorized and empowered to entertain jurisdiction of a suit in equity to preserve the waters aforesaid for the use and benefit of the citizens and inhabitants of this State, and to prevent their being, by pipes, conduits, ditches or canals, carried or transported to other States for use therein; and to that end to issue such restraining order or injunction, both preliminary and final, as may be necessary, and to enforce the same in the same manner it is empowered to enforce other injunctions or orders.

3. This act shall take effect immediately.

# HUDSON COUNTY WATER COMPANY v. McCARTER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 184. Argued March 18, 19, 1908.—Decided April 6, 1908.

The boundary line between private rights of property which can only be limited on compensation by the exercise of eminent domain, and the police power of the State which can limit such rights for the public interest, cannot be determined by any formula in advance, but points in that line helping to establish it have been fixed by decisions of the court that concrete cases fall on the nearer or farther side thereof.

The State, as *quasi*-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners immediately concerned. *Kansas* v. *Colorado*, 185 U. S. 125; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

The public interest is omnipresent wherever there is a State, and grows more pressing as population grows, and is paramount to private property of riparian proprietors whose rights of appropriation are subject not only to rights of lower owners but also to the limitations that great foundations of public health and welfare shall not be diminished.

A State has a constitutional power to insist that its natural advantages remain unimpaired by its citizens and is not dependent upon any reason for its will so to do. In the exercise of this power it may prohibit the diversion of the waters of its important streams to points outside of its boundaries.

One whose rights are subject to state restriction cannot remove them from the power of the State by making a contract about them, and a contract illegal when made—such as one for diverting water from the State—is not within the protection of the contract clause of the Constitution.

One cannot acquire a right to property by his desire to use it in commerce among the States.

Citizens of other States are not denied equal privileges within the meaning of the immunity clause of the Constitution by a statute forbidding the diversion of waters of the State if they are as free as the citizens of the State to purchase water within the boundaries of the State, nor can such a question be raised by a citizen of the State itself.

Chap. 238, Laws of New Jersey of 1905, prohibiting the transportation of

water of the State into any other State is not unconstitutional either as depriving riparian owners of their property without due process of law, as impairing the obligation of contracts made by them for furnishing such water to persons without the State, as an interference with interstate commerce, or as denying equal privileges and immunities to citizens of other States.
70 N. J. Eq. 695, affirmed.

THE facts are stated in the opinion.

*Mr. Gilbert Collins* and *Mr. Richard V. Lindabury* for plaintiff in error:

The act of 1905 is an attempt to control interstate commerce, and cannot be sustained under the police power.

As is established by principle and authority, the court must examine the reasonableness of a claim to support a state statute regulating commerce, under the guise of an exercise of the police power. The act of 1905, as applied to the Passaic, is without any justification in the needs of the inhabitants of the State.

Water when reduced to possession is a commodity, which may be sold, like any other. *Syracuse* v. *Stacey*, 169 N. Y. 231, 245; *Suburban Water Co.* v. *Harrison*, 72 N. J. L. 194.

When a statute, interfering with interstate commerce, is founded on the police power of the State, the question always arises whether the act goes beyond the necessity for its exercise. This question is judicial. The reasonableness of the statute is an element of the inquiry whether it encroaches upon the national authority. *Railroad Co.* v. *Husen*, 95 U. S. 473; *Lake Shore Railroad Co.* v. *Ohio*, 173 U. S. 285, 300; *Lochner* v. *New York*, 198 U. S. 45; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Brimmer* v. *Rebman*, 138 U. S. 78; *Scott* v. *Donald*, 165 U. S. 58; *Indiana* v. *Indiana &c. Oil, Gas & Mining Co.*, 120 Indiana, 575; *S. C.*, 6 L. R. A. 579; *Benedict* v. *Columbus Construction Co.*, 50 N. J. Eq. 23, 38.

The act is void because it denies equal privileges to citizens of another State. *Minnesota* v. *Barber*, 136 U. S. 313; *In re*

*Watson*, 15 Fed. Rep. 511; *Ward* v. *Maryland*, 12 Wall. 418; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560.

The decision now under review, and the act of 1905, are both attempts to change the common law in order to destroy the vested and contract rights of the plaintiff in error.

The Federal courts will not follow the state courts in the interpretation of state law where it appears that the state courts have undertaken to change the law in such manner as to destroy contract and vested rights, or so as to take property without due process of law.

Plaintiff in error is entitled to have its case considered here fully on the merits, as a common law question, unhampered by any considerations of modern state policy. *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 416, 432; *Chicago* v. *Robbins*, 2 Black, 418; *Michigan Central* v. *Myrick*, 107 U. S. 102.

The act of 1905 is an attempt to impair the obligation of contracts of the plaintiff in error.

The effect of the act is directly to destroy the contracts with consumers in Staten Island, by requiring the court of chancery to enjoin their fulfillment. Unless, therefore, the contracts were invalid upon other grounds than those created by the act of 1905, that act is void, as impairing the obligation of contracts, and the decree for an injunction should be reversed.

The waters of running streams in New Jersey are the common property of the riparian landowners.

Any riparian owner on a fresh water stream may divert and use as much water as he chooses, so long as he does not impair the like right of the owners down the stream without their consent. If he has their consent, he may divert up to the whole flow of the stream. A riparian owner nearest to tide water may divert the whole flow since there are no owners on the stream below him to be injured.

It is really a matter of little importance to know who, if any one, owns the water while running in the stream, because the real question is not the ownership of the water while running, but of the right to take it and divert it.

Running water is incapable of ownership, and neither the State nor the riparian owners have any title in it until it is appropriated. *Sweet* v. *Syracuse*, 129 N. Y. 316, 335; *City of Syracuse* v. *Stacey*, 169 N. Y. 235, 245; *Society* v. *Morris Canal*, 1 N. J. Eq. (Saxton) 157, 189; *Cobb* v. *Davenport*, 32 N. J. Law, 369; *Attorney General* v. *Del. & Bound Brook R.*, 27 N. J. Eq. 631; *Higgins* v. *Flemington Water Co.*, 36 N. J. Eq. 538, 543; *Albright* v. *Cortwright*, 64 N. J. L. 330, 337; *Simmons* v. *Paterson*, 60 N. J. Eq. 385, 389; *Doremus* v. *City of Paterson*, 65 N. J. Eq. 711, 713.

*Mr. Robert H. McCarter*, Attorney General of the State of New Jersey, for defendant in error:

The State, as a lower owner, is entitled to preserve the integrity of the stream so that it will come to it unimpaired in quantity. *Attorney General* v. *Delaware & Bound Brook R. R. Co.*, 12 C. E. Gr. (27 N. J. Eq.) 631; *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Massachusetts, 361; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, and cases there cited; Story's Eq. Jur., §§ 922, 923; Kerr on Injunctions, 262; 1 Joyce on Injunctions, 120; *Missouri* v. *Illinois et al.*, 180 U. S. 208, 243.

The State, without regard to its lower proprietorship, is entitled to an injunction as successor to the crown and as representative of the public; and this, too, notwithstanding the provisions of the Federal Constitution relied upon by the appellant.

The State has a supervisory interest and property in the waters that lie or flow in it, entitling and requiring it, as the representative of the public, to preserve the same, and that this right and duty have been inherited from the King of England. Hargrave's Law Tracts, chap. 2; *Smith* v. *Rochester*, 92 N. Y. 463, 477 and cases cited; Farnham on Waters, §§ 133, 138, 138*a*, 140*a* and 141; *Connecticut River Lumber Co.* v. *Alcott Falls Co.*, 65 N. H. 290; *S. C.*, 21 Atl. Rep. 1090; *State* v. *Ohio Oil Co.*, 150 Indiana, 21; *S. C.*, 49 N. E. Rep. 809;

*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Kansas* v. *Colorado*, 185 U. S. 125; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 226, 237.

The law under consideration was passed as an exercise of the police power of the State, and as such is consequently free from any of the constitutional objections that are here raised against it. *Jones* v. *Brim*, 165 U. S. 180; *P. R. R.* v. *Hughes*, 191 U. S. 477; *Field* v. *Barber Asphalt Co.*, 194 U. S. 623; *Cleveland &c. Co.* v. *Illinois*, 177 U. S. 514; *Cook* v. *Marshall County*, 196 U. S. 261, 272.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an information, alleging that the defendant (the plaintiff in error), under a contract with the City of Bayonne in New Jersey, has laid mains in that city for the purpose of carrying water to Staten Island in the State of New York. By other contracts it is to get the water from the Passaic River, at Little Falls, where the East Jersey Water Company has a large plant by which the water is withdrawn. On May 11, 1905, the State of New Jersey, reciting the need of preserving the fresh water of the State for the health and prosperity of the citizens, enacted that "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." By a second section a proceeding like the present was authorized, in order to enforce the act. Laws of 1905, c. 238, p. 461. After the passage of this statute the defendant made a contract with the City of New York to furnish a supply of water adequate for the Borough of Richmond, and of not less than three million gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic River out of the State. There are allegations as to the amount of water and the prob-

able future demand upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other States, and denies to them the equal protection of the laws. An injunction was issued by the Chancellor, 70 N. J. Eq. 525, the decree was affirmed by the Court of Errors and Appeals, 70 N. J. Eq. 695, and the case then was brought here.

The courts below assumed or decided and we shall assume that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute

owners of the stream, on the ground that it authorized a suit by the State in their interest where it does not appear that they all have released their rights. See *Kansas* v. *Colorado*, 185 U. S. 125, 142. But we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas* v. *Colorado*, 185 U. S. 125, 141, 142; *S. C.*, 206 U. S.

46, 99; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer* v. *Connecticut*, 161 U. S. 519, 534.

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain

unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, § 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 438; *Manigault* v. *Springs*, 199 U. S. 473, 480. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.

The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519, and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See *Asbell* v. *Kansas*, *ante*, p. 251. The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the State within which the river flows, even if they are made to coincide with the state line. Within the boundary citizens of New York are as free

to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the Court of Errors and Appeals was right.

*Decree affirmed.*

MR. JUSTICE MCKENNA dissents.